UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
SAN FRANCISCO DIVISION OF JUDGES

SHAMROCK FOODS COMPANY

and **Case 28-CA-150157**

BAKERY, CONFECTIONARY, TOBACCO WORKERS' AND GRAIN MILLERS INTERNATIONAL UNION, LOCAL UNION NO. 232, AFL-CIO-CLC

GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

I. Introduction

This is a case where the conduct of Shamrock Foods Company (Respondent) struck continuously at the core of the Act, squelching employees' rights to freely associate, and taking away their dignity in the process. Specifically, this is a case where Respondent's management, up and through the highest levels of the organization, strategically attacked growing support for union representation by soliciting employees' grievances and promising to do better in the future. When that failed, Respondent upped the ante by firing an employee it perceived as a strong leader amongst many in the warehouse.

This is also a case where employees fought back, fighting for their right to organize by openly supporting the Bakery, Confectionary, Tobacco Workers' and Grain Millers International Union, Local Union No. 232 (Union), even after Respondent's management threatened them about choosing the Union, questioned them about their Union support, fired the most outspoken amongst them, and subjected them to relentless meetings where supervisors warned they knew exactly who the Union supporters were. But again, Respondent's management matched the workers' zeal by raising the stakes one more time. Respondent reacted with fury by threatening employees that the Union would hurt them, implying that it would never bargain in good faith with the Union, searching for union authorization cards within employees' belongings, confiscating union literature, and disciplining and threatening a lead organizer using some not-so-thinly veiled references to his union activity. Thus, contrary to what Respondent would have the Administrative Law Judge believe, it did in fact become a "fire breathing, Union busting machine monster" who orchestrated a scheme to violate the rights of its employees.[1]

[1] Tr. 859:3-9.

II. Statement of the Case

This matter is before Administrative Law Judge Jeffrey D. Wedekind (the ALJ) upon the General Counsel's Complaint and Amendment to the Complaint alleging that Respondent violated Section 8(a)(1) of the Act by engaging in a variety of coercive conduct and violated Section 8(a)(3) of the Act by discharging employee Thomas Wallace and disciplining employee Mario Lerma for engaging in union and protected concerted activities.[2]

The ALJ heard this case on September 8 through September 16, 2015,[3] in Phoenix, Arizona. The ALJ granted two motions to amend the Complaint during the course of the hearing. Specifically, the ALJ granted the General Counsel's motion to add an allegation that Respondent violated Section 8(a)(1) of the Act by granting employees benefits on April 29, when Respondent, by Mark Engdahl, guaranteed that there would be no lay-offs during the summer. Tr. 20:9-23:13. Later, the ALJ granted the General Counsel's motion to amend the Complaint to allege that on about January 2, Respondent promulgated and since then maintained an overly broad policy prohibiting and restricting cell phone use on its premises. Tr. 750:15-752:2.

On the second day of hearing, September 9, the ALJ granted the General Counsel's request for sanctions against Respondent as a result of an unprecedented disregard for its obligations to produce documents in response to a subpoena duces tecum.[4] Specifically, on the

[2] The General Counsel notes that a related case seeking a Section 10(j) injunction in this matter was filed, which, pursuant to Section 102.94 (a) of the Board's Rules and Regulations, requires that this matter now be "given priority by the Board" in all steps of the proceeding following the issuance of the complaint through the ultimate enforcement or dismissal by the appropriate circuit court of appeals.

[3] Hereinafter, all dates are 2015, unless otherwise noted.

[4] Although representing to the General Counsel and ALJ otherwise on the first day, Respondent failed to produce any documents responsive to countless requests. After reviewing Respondent's production (or lack thereof), the ALJ stated, "I've never seen anything like it, never seen anything like it. . . . So I'm going to grant sanctions. Everything the General Counsel asked for." (Tr. 123:6-11).

issue of supervisory status, the ALJ ruled that Respondent could not present direct evidence or cross-examine the General Counsel's witnesses. Further, the ALJ allowed the General Counsel to present secondary evidence on this issue. Tr. 123:18-20. Ultimately, the ALJ granted the same sanctions related to the allegation that Respondent unlawfully granted benefits – a wage increase – to employees. Tr. 916:11-928:16. Furthermore, the ALJ granted General Counsel's request for adverse inferences to be drawn in favor of the General Counsel when testimony revealed that there were documents responsive to the General Counsel's subpoena, but were not produced or documents that were contrary to the representations made by Respondent's counsel. Tr. 124:8-13. However, the ALJ decided that adverse inferences should be argued in the brief. *Id.*

III. Analysis of the Facts

A. Respondent's Operations , Policies, and Supervisory Hierarchy

1. Respondent's Operations

Respondent is engaged in the large-scale manufacturing and processing of dairy products and the wholesale distribution of a variety of food products. As such, Respondent's operations consist of two separate divisions: the dairy division and the distribution division. Tr. 137:16-138:8. The conduct at issue in this matter occurred within Respondent's distribution division, at its warehouse in Phoenix, Arizona.

The Phoenix warehouse is located in the same building that houses the meat plant and administrative offices. Tr. 140:9-14. Approximately 280 employees work in the warehouse in various positions, including loaders, pickers, forklift operators, runners, and throwers. Tr. 140:24-141:2.

2. Supervisory Hierarchy at the Phoenix Warehouse

There are several layers of management overseeing the operations at the Phoenix warehouse. First, there are Floor Captains. Floor Captains are responsible for directing and expediting the work flow on the warehouse floor. In doing so, they identify tasks to be completed and pull employees, when necessary, from their regular work area to perform the needed task. Tr. 485:9-488:22. Floor Captains are expected to move as many cases as possible within the warehouse in the shortest amount of time by directing associates to fill in based on operational needs. Tr. 488:19-489:11. Floor Captains communicate with their supervisors either in-person or over a hand held radio. Tr. 489:22-490:13. However, in performing their main task ─ expediting the work flow ─ Floor Captains do not need to seek permission when deciding who or how to direct the work to be done.[5] Tr. 489:24-490:13. Additionally, Floor Captains are held responsible for decisions that end up interrupting the work flow rather than expediting it. Tr. 488:23-489:11. Each Floor Captain is responsible for expediting the work of about 20 to 30 warehouse associates. Tr. 647:25-648:2. Floor Captains meet with upper management every Monday. Tr. 766:14-767:16. Floor Captains are paid on a higher incentive scale than warehouse employees.[6] Tr. 765:20-766:8. Some Floor Captains, such as Zack White, also perform administrative duties in an office. Tr. 491:16-22. Arthur Manning is also a Floor Captain. Tr. 485:18-20.

[5] To the extent that testimony lacks in showing what Captains' main job function is, the ALJ should draw an adverse inference in favor of the CGC because, among many other relevant documents, Respondent failed to produce a job description for this position. Tr. 61:22-70:3. In response to the ALJ's question of whether the company had any documents showing their duties or authority, Respondent's counsel answered, "I'm sure that that's out there. I guess we were focusing on substantive, you know, supervisors." Tr. 65:3-8. Such documents were requested in items 1-7 of the General Counsel's subpoena duces tecum. GC Ex. 2(e) at Exhibit 1, pages 1-2.

[6] To the extent that testimony lacks in showing that Captains are paid more than associates, the ALJ should draw an adverse inference on this issue because the pay rates were shown to exist (if there was any doubt) and were not produced as requested in items 1 of the General Counsel's subpoena duces tecum. Tr. 766:9-13; GC Ex. 2(e) at Exhibit 1, page 1.

Above Floor Captains are in-bound and out-bound supervisors, including David Garcia and Jake Myers. Tr. 499:13-16; 862:1-10; 939:2-14. Those supervisors report to Warehouse Manager Ivan Vaivao (Vaivao). Vaivao reports to Operations Manager Jerry Kropman, who reports to Vice President of Operations Mark Engdahl (Engdahl). Tr. 337:20-338:10. Engdahl reports directly to the President and CEO, Kent McClelland. *Id.* Kent McClelland's father, Norman McClelland, is the Chairman of Respondent's Board of Directors. Tr. 427:22-7.

Respondent also has a Human Resource Department. During all relevant time periods, Natalie Wright (Wright) worked in the Human Resource Department as a Human Resource Manager. Tr. 362:2-13. For a short period of time, James Allen (Allen) worked under Wright as a Human Resource partner or generalist. Tr. 363:22-25; GC Ex. 10(a) at 11:18-19. Wright reported to Human Resource Director Monica Hergert, who reports to Vince Daniels (Daniels), the Vice President of Human Resources. Tr. 362:24-365:12. Daniels was hired in August 2014 as the successor to Senior Vice President of Human Resources Robert Beake (Beake) once he retires. Tr. 707:20-708:21; 430:14-24. Beake directly reports to Kent McClelland as a member of his senior staff. Tr. 346:19-347:3; 434:2-6.

Several senior managers work at a corporate office located about 30 minutes from the Phoenix warehouse.[7] Tr. 139:14-23; 338:20-25. Those managers include McClelland and Beake, whose offices are adjacent to one another. Tr. 429:8-19. Daniels also works out of the corporate office. *Id*.

[7] There was inconsistent evidence concerning the location of Engdahl's office. Vaivao testified that Engdahl's office is in the warehouse, and several witnesses testified that employee Mario Lerma met with Engdahl in his office at the warehouse. Tr. 139:12-13; 743:17-22. However, seemingly in an effort to avoid questioning about documents responsive to the General Counsel's subpoena duces tecum, McClelland testified, in response to questions about how he communicates with managers who oversee the Phoenix warehouse, that he communicates through Engdahl, whose office is at the corporate location. Tr. 339:3-11.

3. Respondent's Associate Handbook

During all relevant times, Respondent maintained an Associate Handbook dated January 1, 2014. GC Ex. 3. Tr. 141:10-142:19. Warehouse Manager Vaivao, who is in the best position to know Respondent's work rules, testified that he was unaware of any revision or changes to that handbook. Tr. 141:10-142:19. He also testified that he has never seen a more recent version of the handbook, and Respondent did not enter any other version of the handbook into evidence. *Id.*

The handbook contains numerous work rules, including those alleged by the General Counsel to be unlawful, the substance of which is described below in Section IV (Legal Analysis), Part D, for ease of reference. In addition to including work rules, the handbook sets forth Respondent's progressive disciplinary policy. The policy has five steps ─ the first disciplinary step is "Counseling," the second step is a "Verbal Warning," the third step is a "Written Warning," the fourth step is a "Final Warning/ 3-Day Suspension," and the fifth and final step is "Termination." Tr. 142:15-143:17; GC Ex. 3 at 64.

B. Respondent's Warehouse Employees Begin Organizing

In November 2014, Respondent's warehouse employees, led by forklift operator Steve Phipps (Phipps), began organizing support for the Union.[8] Tr. 494:10-19. From November through January, a full-fledged union organizing drive was underway. An organizing committee was convened and held regular meetings with new supporters. Tr. 497:9-498:20. During this time, employee Mario Lerma (Lerma) joined the organizing committee, and employee Thomas Wallace (Wallace) signed an authorization card. Tr. 651:21-652:1; 784:12-785:6.

[8] Respondent denied that the Union was a labor organization in its Answer to the Complaint. After presenting evidence on this issue, CGC moved for a ruling on the record. The ALJ found that the Union, to no surprise, is a labor organization as defined by the Act. Tr. 475:13-476:8. Thus, this issue is not addressed in CGC's brief.

C. Respondent Begins its Anti-Union Campaign

In January, Respondent began its own campaign to undermine union support in the Phoenix warehouse. For several months, Respondent held "education meetings" intertwined with its newly resurrected "roundtable meetings" intended to solicit employee grievances. Vaivao described the series of meetings as the "roundtable process." Tr. 899:9-25. During these meetings, Respondent's management spoke off-the-cuff, making promises and informing employees they knew exactly who was behind the organizing campaign. Tr. 185:15-186:1.

1. Respondent Holds a Town Hall Meeting

Respondent's anti-union campaign began at the Phoenix warehouse on January 28. On that day, Respondent shut down its operations to address all of its warehouse workers in a Town Hall meeting conducted by Vice President of Operations, Mark Engdahl.[9] Tr. 156:2-10; 500:1-17; 648:3-15. Respondent had been preparing at least a week for this meeting. Tr. 500:18-501:2. There was only one item on the agenda ─ Respondent's position on unionization at its company.[10] Engdahl was very clear at the beginning of this meeting that the information he was to convey related to the Phoenix warehouse,[11] and not just to Respondent's operations in California. GC Ex. 8(a) at 2:6-10; GC Ex. 8(b) 8:39-8:50; Tr. 501:3-10.

[9] Engdahl tried to downplay how many employees were present at this meeting. First he said there were about 50 even though he said that they tried to reach every employee between this and one other Town Hall meeting. When pressed on this rather immaterial issue, Engdahl deflected to his bad memory. Tr. 733:20-734:10.

[10] Respondent's witnesses were not forthcoming when testifying about this meeting. Although the meeting obviously related to unions, when asked *four* times by the General Counsel the simple question of whether unions were discussed in the meeting, Wright refused to admit unions were discussed until the ALJ interjected. Tr. 378:3-379:20; GC Ex. 8(a), 8(b). Vaivao similarly claimed that he was unable to remember whether unions were discussed. Tr. 156:24-157:4. Engdahl had to be asked dozens of questions before he admitted that he even held the meeting in January and before he admitted to what aids he used in conducting it. Even then, he "couldn't tell . . . for sure" any specific details of the meeting and would not admit that he conducted the meeting, instead only admitting that he was sure that he "spoke at them." Tr. 729:9-733:7.

[11] On cross examination, Engdahl would not deny that he told employees the meeting was related to the Phoenix warehouse. Tr. 897:11-20

During this Town Hall meeting, Engdahl made several concerning statements. When telling the employees what voluntary recognition was, Engdahl said that a company can call a union and seek representation itself. GC Ex. 8(a) at 8:25-9:2. He continued to say that sometimes companies do that in order to go into collective bargaining so that "[t]he slate is wiped clean on wages, the slate is wiped clean on benefits, the slated is wiped clean on working conditions." *Id.* at 9:3-7. Engdahl elaborated by stating again that a company would do that so that they could decrease wages. *Id.* at 9:9-13

Before playing an anti-union video, Engdahl laid out the bottom line for the employees, explaining, "The bottom line is we at Shamrock want to be able to deal directly as a family with all our folks. Okay. If it's a third party in the middle of that, the third party's existence . . . is all about causing strife between both sides, and we don't want that. That's ridiculous." *Id.* at 10:21-25. Then, Engdahl encouraged employees "to use open door policies all the way up through Norman McClelland" or to come talk to him if they were upset about something. *Id.* at 11:1-4.

Engdahl opened the floor for questions near the end of the meeting. After dead silence, employee Wallace asked two questions. First, Wallace asked whether all of Respondent's employees would be represented by a union if other employees joined a union. GC Ex. 8(a) at 12:25-13:2. Then, he asked why Respondent's competitors were union. *Id.* at 13:9; Tr. 502:22-503:9. This second question really stuck out in Engdahl's mind because, as he described it, the question was "insightful." Tr. 894:10-18; 897:21-898:1. Engdahl stated that in the many years that he has been "educating" employees about unions at Town Hall and other types of meetings,[12] he had never heard an employee ask a question like Wallace's. Tr. 897:21-898:1.

[12] Engdahl has conducted many meetings like this in the past throughout Respondent's organization. He described holding these meetings as part of his function. Tr. 732:4-8; 733:17-19; 748:17-20.

Regardless, Engdahl answered Wallace's question consistent with his earlier statements implying that collective bargaining would result in wage losses, and misinforming employees in the process. Specifically, he told them that their competitors have been union for a long time and it is difficult to get a union decertified, explaining, "To decertify a union or vote it out, it takes 70 percent plus one." *Id.* at 13:10-15. Engdahl went on to explain the other reason why Respondent's competitors were union by stating that Cisco and US (Respondent's competitors), "use that to keep the wages down because everyone is paid the same then." *Id.* at 13:23-14:4; Tr. 503:10-16.

The next question was from another employee who asked the purpose of the meeting. He admitted that he "walked in a few minutes late." Engdahl told him that purpose of the meeting was to educate the employees on unions to "give everybody knowledge and power to make good decisions." GC Ex. 8(a) at 14:16-21.

2. Respondent Solicits the Employee Grievances

Immediately following Engdahl's Town Hall presentation, Respondent began a series of smaller meetings. Tr. 382:17-23; 385:6-13. Some employees walked directly from the Town Hall meeting to a roundtable meeting conducted by Human Resource Manager Natalie Wright. Tr. 503:23-504:10. At the meeting, Wright inquired about what issues the employees were experiencing in the warehouse. GC Ex. 15(a) at 8:2-8. Wright's assistant took notes during the meeting, and Wright promised to take the employees' concerns to management. *Id.* at 8:8-22; Tr. 387:17-388:5; 504:3-5. Respondent had not held a meeting of this nature since October 2013. Tr. 385:6-18. Further, the previous "roundtable" meetings had been held with larger employee groups of about 250, as compared to the ten employees who attended this meeting. Tr. 504:2-5; GC Ex. 15(a) at 6:23-7:18.

3. Respondent Begins Learning Who Is Behind the Union

Around the time Respondent began holding meetings for its employees, in late January, Respondent's Floor Captains and other supervisors began attempting to discover employees' sympathies toward the Union by questioning them and showing up at their union meetings.

Just a few days prior to the Town Hall meeting, on about January 25, lead organizer Phipps was questioned by his Floor Captain, Zack White (White), as to whether he knew anything about organizing within the Phoenix warehouse. They first discussed the campaign going on in California, and then White told Phipps that there were rumors of a campaign in the Phoenix warehouse. Phipps asked White if he knew anything about the organizing in the Phoenix warehouse. White responded that he only heard that there was a union close to getting in. Then, White asked Phipps whether he knew anything about that. Phipps deflected by saying that he remembered what happened years ago to other organizers and that he planned on protecting himself.[13] R Ex. 1 at 20; Tr. 498:21-499:12; 615:25-617:19.

Immediately following the Town Hall meeting, supervisor Jake Myers (Myers) spoke with several employees about what they thought about the Union. In particular, Myers approached employee Thomas Wallace after the meeting while Wallace was working at his station. He asked Wallace directly what he thought about the Union.[14] Tr. 649:17-25. Wallace, not hiding his sympathies, told Myers that although he still had to do his research, he heard from others that union members had better benefits. There were no other employees present for this

[13] Phipps testified on direct consistent with his Board affidavit, but in less detail. On cross examination, Phipps did not waiver. When asked, "Zack actually just said there were rumors of organizing in the warehouse, correct?" Phipps responded, "He asked me if I knew anything about it." Tr. 616:4-6. Then, Respondent's counsel read several lines from his Board affidavit, taking the conversation Phipps had with White out of context. Tr. 616:4-617:19. The Board affidavit clearly states that White asked him if he knew anything about organizing in the Phoenix warehouse. R Ex. 1 at 20:13-17. Respondent did not call White as a witness.

[14] Myers testified on both direct and cross-examination that he could not recall whether he questioned or even talked to Wallace after the Town Hall meeting. Tr. 864:8-13; 867:1-13. Thus, no evidence was presented to rebut Wallace's version of events.

conversation. Tr. 650:1-18. Myers was known to employees as being against the Union. Tr. 499:13-16.

On that evening, employees met with Union organizers at a local Denny's restaurant. Tr. 517:14-21. Several employees attended this meeting including Phipps and Wallace. Tr. 651:4-20. An unexpected guest also arrived at Denny's ─ Floor Captain Arthur Manning.[15] Wallace, who recognized Manning's truck in the parking lot, called a coworker to warn him. Tr. 652:2-19. The employees and organizers decided to leave shortly thereafter. Some of the employees engaged in conversation with Manning about the Union as they passed him on their way out. Manning made it very clear that he did not support the Union, and had never been for the Union. Tr. 517:22-519:13; 969:5-21; 976:13-18. Phipps left Denny's to meet with an additional employee at a local gas station instead to sign an authorization card. Tr. 519:14-25.

4. Respondent Continues to Solicit Concerns and Intimidates Employees

Respondent continued its meetings with employees throughout February and March. During these meetings, Respondent's managers continued to probe employees about what their issues were on the warehouse floor and engaged in so-called "Union education."

On February 5, Vaivao and Wright met with employees. Opening this meeting, Vaivao clearly connected this meeting with the other types of meetings Respondent had recently held. Vaivao told employees that they were having communication meetings to follow up on the roundtable meetings and an opportunity to "be a little more intimate" because in the "big town hall meeting, [employees] kind of get lost in the shuffle." GC Ex. 7(a) at 2:1-13. Vaivao

[15] Manning's testimony that he was invited to the meeting is highly suspect. For example, on cross-examination, Manning testified that he had no idea what the meeting was going to be about. Tr. 973:16-25. Backtracking from this statement, Manning suggested that he figured the meeting was to discuss issues at Respondent *because* he had similar meetings with *Phipps* in the past. Tr. 973:3-8. However, Manning testified that Phipps was not the one who invited him to Denny's on this occasion. Tr. 973:9-11. In fact, Manning never testified to who allegedly invited him to the meeting, instead vaguely saying that a "couple employees at Shamrock" asked him to go. Tr. 967:21-24.

continued to tell employees that he wanted to get their feedback on what was bothering them. *Id.* at 2:19-24; Tr. 523:10-524:10. Then, he said that he was going to take notes so that he knew their concerns because Respondent wanted "to commit to removing the majority of the obstacles" in the workplace. GC Ex. 7(a) at 2:25-3:8. Vaivao continued by opening the floor to hear the employees' concerns. He said, "So what's going on? What's the feel out there and what are your guys' main concerns?" *Id.* at 3:18-19. Several employees raised issues. Then, Wright followed up with some information addressing some of the concerns employees expressed at the previous roundtable meeting, including wages and benefits. *Id.* at 3:9-11, 16:24-19:24.

Respondent held similar meetings with the majority of employees at the warehouse, including a meeting that Wallace attended in mid-February. Vaivao and Wright also conducted the mid-February meeting. Tr. 653:1-22. During this meeting, employees watched an anti-union video and then Vaivao and Wright opened the floor for discussion. Tr. 653:21-654:9. Then, just as in the February 5 meeting, Wright began discussing wages by giving comparisons within the industry. Tr. 654:3-5; GC Ex. 7(a) at 17:20-18:14, 19:9-17.

Vaivao conducted another meeting on February 24. During this meeting, Vaivao said that he was continuing his "union education meeting[s]." GC Ex. 9(a) at 2:1-4. He said that some employees were hearing about the Union from their coworkers and were concerned because their "financial affairs" were being addressed. *Id.* at 2:14-18. Then, he said that a manager in the meat plant was approached by the Union and that Respondent had some idea of "who's out there" organizing. *Id.* at 2:19-22. Vaivao went on to say that if the employees did not want to sign a union card, they should "[t]ell them no. Tell them hell no." *Id.* at 4:2-5. He said that as long as they showed some interest, the Union would still approach them. Then, he said that they should "[t]ell them no, you won't be a part of it." Finally, he instructed them to

"[r]aise [their] hand, say hey, man, this guy is bugging me, you know." *Id.* at 4:2-12. See also Tr. 529:15-530:25.

On March 26, Vaivao conducted another meeting with a small group of employees. Vaivao began the meeting by addressing an issue that had come up previously from employees: the potential summer lay-off. He explained how the slow season was approaching, but that Respondent had an action plan to combat the lay-offs from years prior. GC Ex. 10(a) at 2:16-4:12. Then, Vaivao addressed why the workers were at the meeting. He said, "The reason why we're here, we're going to continue with our *union prevention meetings*.[16] All right. Some of you guys have been in these meetings. We play a little corny video. This time, a little different. . . . The reason why I'm up front with everybody is that there's associates out there, believe it or not, they're getting fed up with it. All right." *Id.* at 4:14-22. He continued to explain that employees were concerned about repeatedly being approached by the Union and that they wanted it to stop. He said that those employees were considering filing a harassment complaint.[17] *Id.* at 4:23-5:5.

Immediately following, Vaivao started to discuss the "rights of a union organizer." *Id.* at 5:7-9. He said that the "known guys" had personal agendas against Respondent; that Respondent "know[s] who they are" and that Respondent "know[s] they've been conducting meetings offsite." *Id.* at 5:9-14. Later, Vaivao continued to tell employees that he knew who the organizers were. He told employees that they should spread the word to their coworkers that he was going to be "very, very vigilant here." *Id.* at 10:14-16. Then, he continued to say that

[16] Interestingly, Vaivao testified that Respondent never held "union prevention meetings." He testified, before being confronted with the recordings, that "They weren't union prevention meetings. All right. So these were – I was very, very clear. I was very, very clear that these weren't union prevention meetings." Tr. 155:17-24.

[17] Later in the meeting, Vaivao brought up harassment again. He said that "So when I get a harassment [complaint] from a guy that's fed up with guys presenting him with [union] cards and identify who those guys are, there's going to be a different conversation with HR. . . because it becomes an harassment peace [*sic*]." GC Ex. 10(a) at 9:19-24.

"whoever is [organizing] out there, we know who they are, because they come the next day to me." Without ever naming who came to him to report employees' protected activities, Vaivao went on to say, "So I know who they are. I know there's meetings out there. I know there was a meeting a couple – a few weeks ago. And I know who attended." *Id.* at 11:4-8.

5. Respondent Fires Thomas Wallace

On April 6, in the midst of Respondent's campaign against the Union, long-term employee Thomas Wallace was abruptly discharged at the direction of Respondent's most senior managers after raising issues about employees' health insurance benefits.

a. Wallace Stands Out During the Meeting on March 31

Wallace, along with the majority of his coworkers, attended a mandatory Town Hall meeting again on March 31. This time, Senior Vice President of Human Resources Bob Beake conducted the meeting, giving employees a run-down of the financial status of the company. Tr. 437:3-6; 534:19-535:10; 605:1-10; 654:24-655:23. Before adjourning, Beake opened the floor for questions and answers. Again, Wallace spoke up. This time, he asked several questions related to the health insurance that Respondent offers its employees. Specifically, he asked if Respondent would be willing to go back to the same benefits it offered in the past and, alternatively, whether Respondent would fund all of the employees' Health Savings Accounts to cover the cost of the newly implemented high deductible. Other warehouse employees reacted to his questions with applause and laughter. Tr. 310:17-311:15; 437:11-438:23; 656:11-19; 715:12-22; GC Ex. 11(a) at 30:7-31:6; GC Ex 11(b) at 50:47. Beake answered his questions, giving no indication that Wallace was inappropriate in any way. GC Ex. 11(a) at 30:11-31:15. Shortly thereafter, and about five minutes before the meeting ended, Wallace left the auditorium and reported to his work station. Tr. 658:1-7; GC Ex 11(b) (meeting ends at 58:05). Wallace's

immediate supervisor, Jake Myers, who also left the meeting early, did not question why Wallace arrived at his work station earlier than the rest of his coworkers. Instead, Myers assured Wallace that he would not get in trouble for asking questions.[18] Tr. 658:1-659:6.

b. Respondent Decides to Discharge Wallace

After Wallace spoke up at the meeting on March 31, Respondent decided to discharge him. Respondent's supervisors and managers gave inconsistent testimony about that decision.

Vice President of Human Resources Vince Daniels testified that he was solely responsible for deciding to terminate Wallace. Daniels stated that he decided to have Wallace fired because he made a dismissive gesture and left a mandatory meeting early. Tr. 716:3-16; 718:14-20. Daniels testified that the decision to terminate Wallace for these reasons was pretty "cut and dried," [sic] despite Respondent's maintenance of a progressive discipline policy. Tr. 720:15-721:2. According to Daniels, the only communication he had about terminating Wallace was over the telephone with a new hire in the bowels of the Human Resource Department. Tr. 719:7-721:2. Daniels testified that he could not recall having a conversation with Beake about Wallace's discharge, and he unequivocally testified that he never showed Beake the type of gesture that Wallace allegedly made during the meeting. Tr. 712:9-714:3.

Beake, on the other hand, gave testimony indicating that others were involved in the decision to discharge Wallace. Beake initially testified that he never heard Wallace's name prior to the notification of the trial. Tr. 439:8-17. Later, he resisted testifying about a conversation he had with Daniels about terminating Wallace. When asked why Daniels discharged Wallace, Beake responded, "I guess you would have to ask him." Tr. 439:18-440:4; 442:8-10. In his account of his discussion with Daniels about Wallace's discharge, Beake said that Daniels

[18] Although Myers testified at the hearing, Respondent's counsel did not elicit any testimony regarding Myers' conversation with Wallace after the meeting. Tr. 865:15-866:3.

informed him that "they" made the decision to discharge Wallace, but later testified that "we" decided to terminate Wallace. Tr. 439:22-440:4; Tr. 447:13-448:10. Further, although Daniels denied showing Beake the kind of gesture Wallace allegedly made, Beake said that Daniels described Wallace's gesture to him and even repeated the gesture for the Court, though he claimed not to have seen the gesture himself. Tr. 443:16-444:9. Beake's indications that he and others were involved in the decision to discharge Wallace is consistent with Wallace's testimony that Vaivao told him that the decision came from upper management ─ Kent and Norman McClelland ─ since Beake has been a part of McClelland's inner circle for many years and plays an active role in Respondent's strategic planning. Tr. 432:15-21; 433:24-434:6; 661:25-662-9.

Respondent presented yet another rationale for the decision to discharge Wallace in a position statement dated June 8, submitted during the investigation of the charge. In its position statement, Respondent states that Wallace was discharged after "belligerently interrupting a senior Company official multiple times [and because] Wallace abruptly left the meeting without permission." GC Ex. 29 at 22. None of the witnesses at the hearing described Wallace's conduct at the meeting as "belligerent." At worst, he was described as, "disrespectful." However, the recording speaks for itself. The tone of Wallace's voice was in no way disrespectful. GC Ex. 11(b) at 50:45-52:15. Even Vaivao testified, after listening to the recording, that Wallace did not sound inappropriate when asking his questions. Tr. 312:5-9.

Respondent did not introduce any documents related to Wallace's discharge resolving the inconsistencies concerning the decision to discharge Wallace. Moreover, Respondent failed to produce any documents or other communications related to Wallace's discharge, including a termination report that was revealed to exist during Wright's testimony, in response to the General Counsel's subpoena duces tecum. In fact, despite Wright's admission to the existence of

a termination report, Respondent represented that there was no such document in discussions about the subpoena. Tr. 84:17-85:22; 404:14-406:24; 410:16-413:6; 422:15-20.

Regardless, Beake and Daniels admitted that they did not know of any other employees who have been fired for similar reasons. Tr. 446:21-447:2. And, admittedly, neither are generally involved in "the bowels of the ship" as Daniels put it. Tr. 439:22-24; 717:15-19. Beake even testified that although Daniels told him about Wallace's discharge, he generally never hears about low-level warehouse associates being terminated. Tr. 446:21-447:4.

c. Respondent Discharges Wallace

On April 6, Wallace met with Vaivao and Allen. Vaivao did most of talking during the meeting. Vaivao told Wallace that he was being fired because he was disrespectful during the March 31 meeting. Tr. 151:4-17. Specifically, Vaivao told Wallace that senior staff was offended by his questions about healthcare and that they thought his questions were rude and disrespectful. When Wallace asked him how this could happen, Vaivao responded that senior staff had come together and that the decision came from the McClellands. Vaivao told Wallace that senior staff thought that if Wallace was unhappy with his benefits, he should find another job with better ones.[19] Vaivao appeared very uneasy as he delivered the news to Wallace that he was fired. Tr. 661:16-662:21.

Allen's role during the meeting was to present Wallace with a separation agreement. Wallace signed the agreement, but only to show that he had received it. Tr. 153:16-23. The

[19] Wallace's testimony on the conversation he had with Vaivao at the time of his discharge is more credible that Vaivao's. For starters, Wallace, in response to open ended questions, testified in great detail about the conversation. In comparison, Vaivao had a difficult time answering questions about what he told Wallace and often referred to the "direction" or "instruction" from the Human Resource Department. Tr. 151:4-17; 152:21-23. Even on Respondent's direct examination of Vaivao, he offered very few details regarding what he said during the termination meeting. Tr. 905:25-906:24. Furthermore, Vaivao was proven incredible time and again after he was confronted with recordings of what he said in other meetings.

relevant portions of the agreement follow.[20]

> Paragraph 9 reads:
>
> Because the information in this Separation Agreement is confidential, it is agreed that you will not disclose the terms of this Separation Agreement to anyone, except that you may disclose the terms of this Separation Agreement to your family, your attorney, your accountant, a state unemployment office, and to the extent required by a valid court order or by law.
>
> Paragraph 10 reads:
>
> All information, whether written or otherwise, regarding the Released Parties' businesses, including but not limited to financial, personnel or corporate information . . . are presumed to be confidential information of the Released Parties for purposes of this Agreement.
>
> Paragraph 12 reads:
>
> You may not use/disclose any of the Company's Confidential Information for any reason following your termination and during the transition period.
> Paragraph 13 reads:
>
> You agree not to make any disparaging remarks or take any action now, or at any time in the future, which could be detrimental to the Released Parties.

Wallace retained a copy of the agreement and left the premises. He has not returned to work since. Notably, Respondent has tolerated disrespectful conduct from employees at Town Hall meetings. Nine years ago, Phipps stood up at a meeting and told Beake that Respondent treated its employees like "red-headed stepchildren" and that the company "didn't give a rat's ass about its employees." Tr. 610:22-611:7. Phipps was not disciplined for that conduct, which took

[20] The separation agreement was admitted as GC Ex. 26.

place at a time when there was no ongoing union organizing campaign in the warehouse. Tr. 630:20-631:1.

D. The Union Makes Bold Moves

Union support began to wane after Wallace's discharge, so the Union decided it was time for a bold move. On April 26, Phipps unabashedly walked into the break room and announced to co-workers that he was on the Union's organizing committee. Tr. 544:14-22. He offered to field questions and told employees that there was a lot of misinformation coming from Respondent about the Union. Phipps made similar announcements in the break room the following two days. Tr. 544:20-545:12.

On April 27, Floor Captain Manning approached Phipps and asked if it was true that Phipps made an announcement. Manning told Phipps he should watch his back because management was closely watching. Phipps responded by saying that he could not talk about the Union while working in the warehouse. Tr. 545:15-24. Although Manning denied that he told Phipps to watch his back because management was watching, he admittedly could not remember whether he ever had a conversation with Phipps about his announcement. Tr. 970:9-24.

E. Respondent Amps up Its Own Efforts to Squash the Union

Respondent's supervisors and managers swiftly and harshly responded to the employees' open support for the Union. Just days after Phipps' announcement, Engdahl amped up his rhetoric, made unprecedented promises, and held a curious disciplinary meeting with a warehouse associate. Other supervisors searched for Union cards and confiscated Union flyers. To top it off, Respondent's President and CEO, Kent McClelland, sent a strongly worded message to every warehouse associate in Phoenix in an effort to combat ongoing Union activity.

1. Engdahl Makes Promises and Amps up the Rhetoric

Just days after Phipps' announcement, on April 29, Engdahl called a meeting with Respondent's more tenured employees, including Phipps. Other managers were also present, including Vaivao, Nicklen, and Kropman. Engdahl began the meeting by telling employees that he owed them some follow up on what had been discussed in previous meetings. He acknowledged that employees had raised concerns about lay-offs. GC Ex. 12(a) at 2:1-7. Respondent has a practice of laying off employees in the summer, which is their slow season. Tr. 738:22-739-15. Then, Engdahl told them that the lay-offs had not been handled correctly the year before, and that Respondent was committed to avoid the same mistakes. Tr. 229:24-234:20; GC Ex. 12(a) at 2:6-7. He said that Respondent was so committed that they were going to put it in writing. GC Ex. 12(a) at 2:8-9. In fact, Engdahl so much as guaranteed that there would be no lay-offs this year when he handed the employees a document stating, among other things, that there would be no lay-off.[21] Before moving onto another issue, Engdahl told the employees they could "take that to the bank." GC Ex. 12(a) at 2:8-14. Vaivao denied that Engdahl could have made such a statement, saying that Engdahl "can't possibly say that" because "[t]hat sounds to me like a guarantee." Tr. 234:10-17. Although Engdahl had discussed trying to avoid a summer lay-off prior, this was the first time that Respondent committed so strongly, and in writing, to do so. Tr. 759:15-21.

Immediately following Engdahl's guarantee, he said that he wanted to have a "little discussion with you on what's going on here with this union organizing[.]" GC Ex. 12(a) at 2:15-17. Then, he told the employees that he knew who was behind the Union; that he knew the

[21] This document was requested in subpoena request number 38 of the General Counsel's subpoena, but was not produced. GC Ex. 2(e) at Exhibit 1, page 6. To the extent that testimony or GC Ex. 12(a) and (b) lack in showing that the document informed employees that Respondent was committed to not laying off employees, CGC respectfully requests that an adverse inference based on Respondent's failure to introduce the document, which is within its control, or produce it in response to the subpoena.

employee was doing it for personal reasons; and that the employee could just "have at it." *Id.* at 2:17-20. Then, Engdahl said he wanted to clarify and straighten out the facts, give them some "truths." That is when Engdahl said the Union "will hurt Shamrock. It will hurt all of you. It will hurt everybody in the future." *Id.* at 2:20-25.

Shortly thereafter, Engdahl addressed another issue that employees had been raising ─ healthcare benefits. He said, "People are still upset over our insurance." GC Ex. 12(a) at 4:5-6. But, he reminded the employees that they were "blessed" and that they should be "less emotional." *Id.* at 4:20-25.

Finally, Engdahl discussed what would happen if the employees selected the Union. He said, "If we got a union in here, would it fix everything? Hell no." As a follow up, he said, "Remember, the company pays wages, benefits, and sets working conditions, not the Union." Engdahl continued, "The only thing the union can do is come to collective bargaining and ask." GC Ex. 12(a) at 6:4-8. He also said that all the Union could do is ask for things, and Respondent would not have to agree to anything, nothing at all. *Id.* at 6:8-10. Then, Engdahl told employees that bargaining could go on forever, that it could never end. *Id.* at 10-12.

Vaivao also chimed in during the meeting, vaguely mentioning employees allegedly complaining about being "threatened" and "harassed" by union organizers, and saying, in part, "There is a lot of people that are very unhappy and they feel harassed by the campaigns. And we get it. We get it. We tell them the same thing. You don't feel comfortable, stand up, tell them exactly what you think, and if anybody threatens you openly, then we will have to deal with that[.]" *Id.* at 8:7-12.

2. Safety Manager Remblance Confronts Phipps

After Engdahl's meeting on April 29, while Phipps was on his break and discussing the Union with a coworker, former Safety Manager Joe Remblance (Remblance) spotted him from about 60 to 70 yards away. Remblance approached Phipps and asked if he was on break. Phipps replied that he was. Then, Remblance asked them what they were talking about. Both employees responded that they were discussing work. Remblance tried to engage in small talk, but left after Phipps indicated he did not want to talk. Before leaving, Remblance warned Phipps that he needed to get back to work as soon as his break was finished. Remblance had never approached Phipps like this before, as he was not in Phipps' supervisory chain. Tr. 551:19-553:12.

3. Supervisor Garcia Searches for Union Cards

A few days later, on May 1, Lerma's supervisor, David Garcia (Garcia), caught wind that he was passing out union authorization cards. Tr. 806:21-814:25. Surprised that Lerma was supporting the Union, Garcia went through Lerma's clipboard that he left on his forklift to find the cards. Lerma, looking through a window directly in front of his forklift, noticed Garcia rifling through his belongings. *Id.* Lerma was not issued a company clipboard and kept work-related, but personal documents, such as his pay sheets, notes on drops, and a track of his work hours, in his clipboard. Tr. 807:15-24; 836:8-11. Lerma approached Garcia and asked him what he was doing. Garcia responded that he was looking for the schedule. Tr. 807:25-810:4.

Later that evening, Garcia approached Lerma to find out if he was staying at work for a longer shift. At that time, Lerma asked Garcia again why he had been going through his clipboard. Garcia admitted that he was looking for Union cards and that he had gotten a call from transportation that Lerma was putting up flyers and had handed a Union card to a

transportation clerk in the breakroom and was shocked it was him. Garcia then told Lerma that the door is always open. Tr. 813:2-814:25.

Although Garcia claimed that he only looked at the schedule on Lerma's clipboard, Garcia had no need to rifle through the clipboard, as Lerma kept his schedule in plain view in a cubby behind the clipboard, and Garcia could access Lerma's schedule on the computer, knew that Lerma's regular schedule was, and had never needed to look at Lerma's personal copy of his schedule in the years the two had worked together. Tr. 808:4-810:4.

4. Respondent Disciplines Lerma

On May 5, four days after Garcia searched Lerma's clipboard, Lerma was summoned to Engdahl's office by Vaivao for counseling.[22] Engdahl, admittedly walking a fine line with his words, cautioned Lerma about his continued Union activity. Tr. 748:12-23. Engdahl informed Lerma that he had heard some "rumblings coming off the [warehouse] floor." He followed up by telling Lerma that he should "take note and stay out of trouble." GC Ex. 13(a) at 2:25-3:5. Then, Engdahl said that he heard there was some "heckling" and "insulting" going on in the warehouse and that there was a "potential slow down on certain folks who are sharing a similar point of view."[23] *Id.* at 3:7-10. Then, Engdahl told Lerma that none of it would be tolerated and that Lerma could get in serious trouble for it. *Id.* at 3:10-13.

When Lerma asked for clarification on why he was there, Engdahl and Vaivao both responded. Engdahl said it was possibly because other employees felt intimidated or threatened, but Engdahl also said that he did not know if that was actually the case. GC Ex. 13(a) at 6:8-7:8.

[22] Incredibly, in response to questions about how Vaivao and Engdahl coordinated to hold this meeting together and the reasons for the meeting, Engdahl testified that he never communicates with Vaivao via e-mail because they always talk in-person. Tr. 742:8-22. Although Vaivao later backtracked, he initially described the meeting he and Engdahl held with Lerma "more [like] a counseling." Tr. 245:17-246:11.

[23] Vaivao and Engdahl refused to admit that they used the word "heckling." Instead, they insisted that they only discussed harassment. Tr. 241:6-8; 747:18-748:4.

Vaivao told Lerma it was because employees were perceiving Lerma's opinions as impacting their wages. *Id.* at 7:9-8:20. Vaivao reiterated to Lerma that his conduct would not be tolerated by telling him that he could "find [him]self in some deeper troubles." *Id.* at 7:9-8:20.

Putting a close to the meeting, Engdahl told Lerma that he was a valuable employee and that Respondent could not afford to lose anyone. *Id.* at 10:18-11:2. The meeting lasted about ten minutes and was recorded in full by Lerma. GC Ex. 13(b) (meeting begins at 2:30 and ends at 14:07).

Engdahl testified that he had this meeting with Lerma because employees were complaining to him that they were being harassed.[24] Tr. 742:23-743:6. He further specified that employees said that Lerma was harassing them by throwing pens at them because they would not sign union cards and that Lerma was not making drops for those that did not support the Union. Tr. 743:8-12. When asked whether he actually thought that was harassment, Engdahl admitted he did not, but that he thought it was "something that needed to be dealt with, because [Respondent] can't have discord out on the work floor." Tr. 746:19-22.

5. McClelland Sends a Strong Message

Three days later, on May 8, President and CEO Kent McClelland sent a letter to all warehouse associates employed at the Phoenix facility. According to McClelland, he learned from someone in the Human Resource Department, whom he was unable to name, that employees had complained about being threatened. However, despite Respondent's practice of investigating harassment complaints, including taking statements from employees, McClelland apparently never learned why the employees felt threatened, to whom they complained about being threatened, whether they ever filed written complaints, or what the details of their

[24] None of these employees provided statements as part of a harassment investigation conducted by Respondent. Tr. 749:13-16.

complaints were. Nonetheless, he "felt it imperative to respond." Tr. 144:1-150:19; 353:11-356:5; 749:6-8.

In his letter prompted by the alleged employee complaints, McClelland states, in relevant part:

> To All Associates:
>
> It has come to my attention that some associates have recently been subjected to threatening, violent, or unlawfully coercive behavior by other associates. This is a very serious matter and one that I take personally.
>
> Let me be clear: Such behavior is not consistent with the Shamrock Foods Company culture and values that are central to us. Shamrock has been in business since 1922, and has never tolerated associates behaving towards each other in a manner which is violent, threatening, or unlawfully coercive. Shamrock Foods Company has always celebrated and encouraged the diversity of its associates and will continue to do so. Associates should not be physically afraid of coming to work. We will not allow associates to behave in a manner which violates the law through threats of violence, or unlawful bullying. Simply put, this type of behavior is unacceptable and I will make every effort to stop it at our workplace.
>
> To that end, if you have been the victim of such behavior, in any way, shape, or form, however minor, please promptly report it. Shamrock will fairly and thoroughly investigate all allegations. If the complaint has merit, Shamrock will take appropriate action against anyone threatening associates and refer the matter to law enforcement for prosecution to the fullest extent of the law if that is the right course of action. Each associate is expected to perform their work in a cooperative manner with management/supervision, fellow associates, customers, and venders.

GC Ex. 14.

McClelland testified that this type of direct communication from him to employees was not unusual. However, aside from standard letters included in the company newsletter, he could not recall the last time he ever sent a letter to employees. Additionally, he could not even recall what the subject matter of any such letter was in the past. Tr. 356:6-357:6. In fact, McClelland had never sent a letter like this in the past 18 years. Tr. 554:6-10.

6. Respondent Confiscates Union Flyers

Towards the end of May and into June, Respondent began confiscating the Union flyers that Phipps and other employees were passing out in the break rooms. On about May 25, Phipps passed out flyers to several employees in the break room. Sanitation Supervisor Karen Garzon (Garzon) took flyers that were on the table right from in between the arms of two employees that she supervises. Tr. 557:1-558:4. Garzon admitted that she took the flyers off the table that the employees were sitting at, but said that she asked afterwards if the employees wanted them back. Tr. 876:2-7; 884:5-14.

Phipps and others continued to pass out flyers every week throughout June, leaving some on the information table in the break rooms. Without fail, Garzon disposed of the flyers. Tr. 558:5-22. Garzon testified that she regularly enforces Respondent's no distribution rule, which she said provides that only health care information is allowed in the break rooms. Tr. 881:4-883:5; 884:21-23. Garzon admitted that she picked up Union flyers on about three occasions in June from the break rooms. Tr. 878:10-20. She further testified that she did that as part of her duty to keep the break rooms clean. Tr. 887:6-8. She also testified that when she checks the break rooms, she checks the whole room, including the all the tables. Tr. 887:3-25. Further, she said that she did not know the flyers were Union-related until she looked at the titles of the documents. Tr. 878:15-20.

A video recording of Garzon in action paints another story. The video clearly shows Garzon entering the break room, going directly to the information table, picking up the flyers without a second thought, and immediately exiting the break room with the flyers in hand. GC Ex. 24; Tr. 566:3-567:18. All of this occurs in a matter of seconds. GC Ex. 24. Garzon did not

even take a cursory look at other areas in the break room that may have needed cleaning as Garzon says she does when regularly cleaning the break room. Tr. 558:18-25; GC Ex. 24.

Respondent has tolerated material in the warehouse that is not specifically health related at other times. Employees have seen information related to mud runs, the Susan G. Komen Foundation, and fundraisers for associates' children's sports teams. Tr. 558:12-17; 780:3-9.

7. Respondent Gives Unprecedented Raise to Employees

Respondent gave some employees a wage increase at the height of its anti-union campaign on about May 29. Although denied in its Answer, Respondent repeatedly stated that it was not contesting that the increase occurred as alleged. Tr. 94:3-95:3; 563:14-564:13. Instead, Respondent's position was that Respondent's intent in giving the increase was at issue. Tr. 587:10-20. In fact, shortly after Phipps made his announcement on April 27, several groups of warehouse employees, including throwers and pickers, received a one to two dollar an hour raise. Tr. 559:1-561:6; 781:7-14; 843:8-19. Although Phipps' testimony about the pay increases was secondary evidence, reliance on such evidence is appropriate in view of Respondent's failure to produce relevant subpoenaed documents. Tr. 94:397:22. Moreover, Lerma testified from personal knowledge that a thrower was given a one dollar an hour raise about two months prior to the hearing, while the Union's organizing campaign was still underway. Tr. 843:8-19. The amount of the wage increases was well above the three to five percent increases Respondent had generally given in the past. Tr. 561:7-14.

IV. Legal Analysis

A. Floor Captains are Supervisors under Section 2(11) of the Act

1. Legal Standard

While a party asserting supervisor status has the burden of establishing supervisor status, *NLRB v. Kentucky River Community Care*, 532 U.S. 706, 711-712 (2001), the record amply demonstrates Manning and White are statutory supervisors. Supervisory status may be found under Section 2(11) of the Act based on "the possession of any one of the authorities listed in [that section which] places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d 385, 387 (6th Cir. 1949), cert. denied 338 U.S. 899 (1949).

The dividing line between true supervisors and employees for purposes of Section 2(11) is whether the alleged supervisor exercises "genuine management prerogatives" which are specifically identified in Section 2(11) of the Act. *Oakwood Healthcare Inc.*, 348 NLRB 686, 688 (2006). "If the individual has authority to exercise (or effectively recommend the exercise of) at least one of those functions, Section 2(11) supervisory status exists, provided that the authority is held in the interest of the employer and is exercised neither routinely nor in a clerical fashion but with independent judgment." *Id.* "[T]he possession of any one of the authorities listed in Sec. 2(11) places the employee invested with this authority in the supervisory class." *Ohio Power Co. v. NLRB*, 176 F.2d at 387; *Avante at Wilson, Inc.*, 348 NLRB 1056, 1056, 1059 (2006).

The Board will confer supervisory status on individuals who possess the authority to "assign," which encompasses the designation of an employee to a certain place, time or giving significant overall duties such as tasks to an employee, as long as the act of assigning is performed by the asserted supervisor using "independent judgment." *Oakwood Healthcare Inc.*, 348 NLRB at 689, 695. For one or more of the supervisory indicia to be exercised using "independent judgment," the authority must be "independent," meaning "free of the control of others," and it must "involve a judgment," which requires "forming an opinion or evaluation by

discerning and comparing data," and the judgment must involve a "degree of discretion that rises above the 'routine or clerical.'" *Id.* at 693. For example, the Board has declined to find supervisory status based on assignment because when the discretion of the individuals at issue did not rise above merely the routine or clerical where the putative supervisors did not prepare the work schedule; did not assign employees to areas, shifts, or overtime periods; received specific lists of daily projects from supervision; generally oversaw the same work every day; and did not make the decision to borrow or temporarily transfer employees due to absences. *Croft Metals, Inc.,* 348 NLRB 717, 720-722 (2006).

In addition, although not dispositive of the issue of supervisory status, non-statutory indicia can be used as background evidence on the question of supervisory status. *See Training School of Vineland*, 332 NLRB 1412 (2000); *Chrome Deposit Corps*. , 323 NLRB 961, 963 fn. 9 (1997). As the Board has explained, non-statutory indications of supervisory status, or "secondary indicia," such as higher pay, supervisor to non-supervisor ratios, or attendance at supervisor meetings, may bolster evidence demonstrating that individuals otherwise exercise one of the powers listed in the statute. *See Marian Manor for the Aged & Infirm*, 333 NLRB 1084 (2001); cf. *Ken-Crest Services*, 335 NLRB 777 (2001). Secondary indicia include employee perception as a supervisor, attendance at management meetings, difference in uniforms, and ratio of employees to supervisors. *Poly-America v. NLRB*, 260 F.3d 465, 479 (5th Cir. 2001).

Furthermore, an employer is liable for acts of its agents when it is reasonable for employees to believe the agent has reflected the employer's policy and is speaking and acting for management. *See Albertson's Inc.*, 307 NLRB 787, 787 (1992), enf. denied mem. 8 F.3d 20 (5th Cir. 1993). An employer can be held liable for acts of its agents even if those individuals do not possess any of the indicia of supervisory status enumerated in Section 2(11) of the Act. *See*

Solvay Iron Works, Inc., 341 NLRB 208, 210 (2004) (finding foreman was an agent of the employer who conveyed to the employees the notion that he spoke on behalf of management where he had the lead role on the jobsite in making job assignments and held himself out as an employer representative); *Albertson's Inc.*, 307 NLRB at 787; *Great American Products*, 312 NLRB 962 (1993). An agent's unlawful actions which are consistent with an employer's anti-union policies are also considered relevant in attributing an agent's actions to an employer. *Id.* (finding agent's message was not contrary to the message of employer's supervisors which, under the circumstances, would reasonably lead employees to believe the agent reflected the employer's policies and was acting for management).

Employers are liable for the actions of their agents if those agents are acting with apparent authority, even if their actions are contrary to the employer's instructions. *Aladdin Industries*, 147 NLRB 1392, 1392, 1396 (1964). Although motive is unnecessary for statements violating Section 8(a)(1), the presence of a widespread anti-union campaign is relevant in finding an employer liable for the statements of its agents. *Id.* at 1396, 1398. "When, as done here, an employer sets out to campaign against a union, one of the risks is that out of zeal, ignorance, or otherwise, foremen, supervisors, and similar representatives in championing the antiunion cause will overstep the mark." *Id*. at 1398 (internal citation omitted).

2. Manning and White Are Statutory Supervisors and Agents of Respondent

Manning and White, two of Respondent's Floor Captains, are statutory supervisors, by function, and in accordance with Section 2(11) of the Act. Both meet at least one of the primary indicia of supervisor status and have several secondary indicia of supervisor status as well. Alternately, they are Respondent's agents under Section 2(13) of the Act. Regardless of whether they are classified as supervisors or agents, the outcome is the same ─ their actions are

attributable to Respondent, especially since they are consistent with Respondent's ongoing anti-union campaign.

White and Manning regularly exercise the power to assign and direct work in the warehouse. In fact, their main function is to exercise their judgment to expedite work flow in the warehouse.[25] This entails assigning warehouse employees tasks that are sometimes beyond their normal duties. For example, either Floor Captain could assign a forklift operator to divert from his or her regular tasks to pick up new inventory, and, could direct the forklift operator to stock product somewhere other than in overstock, as is the usual operation. Tr. 487:20-25. Floor Captains can directed forklift operators to grab supplies for the loaders and bring them to the loading docks clear across the warehouse. They also assign forklift operators to load product on carts, which is typically the work of a thrower. Tr. 487:25-488:18. Although the assignments are temporary, they nonetheless constitute assignment and transfer of work. Cf. *Oakwood Healthcare Inc.*, 348 NLRB at 689. Moreover, Floor Captains are held responsible decisions they make in the course of expediting the work flow. This shows that they use independent judgment when assigning tasks.

The record also shows evidence of secondary indicia of Manning and White's supervisory status. First and foremost, Floor Captains are paid on a higher incentive scale than warehouse associates. *Belle Knitting Mills, Inc.*, 331 NLRB 80, 80 fn. 3 (2000) (noting that "a higher pay level constitutes a secondary indicium of supervisory status"). Second, Captains attend regular meetings with upper management. *See HS Lordships*, 274 NLRB 1167, 1174 (1985) ("In the presence of other indicia of supervisory status, attendance at management

[25] Where evidence lacks, the ALJ should draw an adverse inference regarding the function and duties of these Floor Captains, as the Board approved in *RCC Fabricators, Inc.*, 352 NLRB 701, 701 fn. 5 (2008). In that case, the Board approved the ALJ's reliance on adverse inferences drawn in regards to whether foremen assigned work using independent judgment because the employer failed to produce a job description that it admitted existed. The ALJ should do likewise here.

meetings may be considered as such."). Furthermore, warehouse associates perceived Manning and White as supervisors. This is evidenced by Wallace's fearful reaction when he noticed Manning's truck in the parking lot of Denny's. He immediately called a coworker to warn him that Manning was there.

B. Respondent Engaged in Countless Independent Section 8(a)(1) Violations

Section 8(a)(1) of the Act prohibits employers from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act. See 29 U.S.C. § 158(a)(1). "It is well settled that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed. The test is whether the employer engaged in conduct which, it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act." *Am. Tissue Corp.*, 336 NLRB 435, 441 (2001); *Overnight Transp. Corp*., 296 NLRB 669, 685-687 (1989), *enfd.*, 938 F.2d 815 (7th Cir. 1991); *Southwire Co*., 282 NLRB 916 (1987) (quoting *Hanes Hosiery, Inc*., 219 NLRB 338 (1975)); *Fairleigh Dickinson Univ.*, 264 NLRB 725 (1982), *enforced mem.*, 732 F.2d 146 (3d Cir. 1984); *Am. Freightways Co.*, 124 NLRB 146 (1959). In determining whether particular statements violate Section 8(a)(1), "the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact on the employees." *Am. Tissue Corp.*, 336 NLRB at 441-42.

There are many types of employer statements or conduct that violate Section 8(a)(1) of the Act, including interrogating or threatening employees, creating the impression of or engaging in actual surveillance of protected activity, soliciting grievances, promising or granting benefits, and enforcing work rules disparately. Here, Respondent's conduct during its anti-union campaign ran the gambit of such violations.

1. Respondent Unlawfully Interrogated its Employees about Their Union Sympathies

a. Legal Standard

In determining whether an unlawful interrogation occurred, the Board considers "whether under all the circumstances the interrogation reasonably tends to restrain, coerce, or interfere with rights guaranteed by the Act." *Rossmore House*, 269 NLRB 1176, 1177-78, 1178 fn. 20 (1984), *aff'd*, 760 F.2d 1006 (9th Cir. 1985), citing *Bourne v. NLRB,* 332 F.2d 47 (2d Cir. 1964). Relevant factors include: the background, including any history of hostility and discrimination; the nature of the information sought; the identity of the questioner, including the person's position in the employer's hierarchy; the place and method of the interrogation; and the truthfulness of the employee's response. *Medcare Assoc., Inc*., 330 NLRB 935, 939 (2000).

b. Respondent Unlawfully Interrogated Phipps on January 25

White's questioning of Phipps on January 25 was unlawfully coercive under the Act. On that day, Floor Captain White asked Phipps if he knew anything about the organizing drive in California involving Respondent's drivers, and then, after mentioning rumors of an organizing campaign in the warehouse but declining to provide specific answers to Phipps' questions about the rumors, asked Phipps if he knew anything about it. Phipps, saying he remembered the organizing campaign 17 years before and wanted to protect himself, essentially denied any involvement in the campaign that he was spearheading. The nature of White's questioning, which was aimed directly at discovering information about a fledgling organizing campaign from the person covertly spearheading that campaign, and Phipps' evasiveness in responding to the questioning, which included saying that he wanted to protect himself, weigh heavily in favor of finding White's questioning unlawful. *See Fresh & Easy Neighborhood Mkt, Inc.* 356 NLRB No. 85 (2011) (finding that a manager unlawfully interrogated employees by asking them about

their contacts with the union and their support for the union's organizing campaign); *Sproule Constr. Co*., 350 NLRB 774, 774 n.2 (2007) (finding that attempts to conceal union support weigh in favor of finding interrogation unlawful); *Grass Valley Grocery Outlet*, 338 NLRB 877, 877 n.1 (2003), *aff'd. mem.*, 121 Fed. Appx. 720 (9th Cir. 2005). Similarly, even in cases where the formality of the questioning or the hierarchical level of the questioner are weighed against other factors, the Board has found direct inquiries from low level supervisors to amount to unlawfully coercive interrogations. *See, e.g., Intertape Polymer Corp.*, 360 NLRB No. 114, slip op. at 1 (2014). (Complaint ¶ 5(f)(1)).

c. Respondent Unlawfully Interrogated Wallace after the First Town Hall Meeting

Supervisor Jake Myers' questioning of Wallace about what he thought about the Union after the Town Hall meeting on January 28, violated the Act. Myers was a first-line supervisor, just above Wallace's Floor Captain in the chain of command. However, Myers' question was directly aimed at determining whether Wallace supported the Union. Wallace's response also weighs in favor of finding the questioning coercive. Wallace gave an indirect response, simply saying that he was going to look into it, but that he heard that Union members had better benefits. Moreover, the questioning immediately followed the birth of Respondent's expressed hostility toward the Union campaign. This backdrop further supports a finding that Myers' questioning was unlawful. *See Westwood Health Care Ctr.*, 330 NLRB 935, 941 (2000) ("Finally, and most significantly, the conversations at issue were against a background of hostility and unlawful conduct."). (Complaint ¶ 5(i)).

d. Respondent Unlawfully Interrogated Phipps after He Announced His Role in the Organizing Campaign to Other Employees

On April 29, just three days after Phipps announced to other employees that he was a lead organizer, Respondent's Safety Manager Remblance who was not in Phipps' supervisory chain and would not normally approach Phipps and another employee from 60 to 70 feet away, asked what they were talking about, questioned them about whether they were on break, and stuck around and talked to them until he instructed them to return to work. Remblance's questioning of Phipps, a known organizer in the warehouse, constitutes unlawful interrogation. Factors weighing in favor of this finding include Remblance's level of authority, Phipps' dissembling in response, and the overall backdrop of hostility in the warehouse.[26] (Complaint ¶ 5(u)(1)).

2. Respondent Threatened Employees with Loss of Benefits

a. Legal Standard

Although an employer may articulate its objections to a union, it may not couple those objections with specific or unspecified threats of reprisal. Thus, an employer statement that collective bargaining "begins from scratch" violates Section 8(a)(1), unless, in context, the employer "makes it clear that any reduction in wages or benefits will occur only as a result of the normal give and take of negations." *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), *enfd. mem.*, 679 F.2d 900 (9th Cir. 1982). But rather, if the statements "leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore," the Board will find such statements amount to an unlawful threat of regressive bargaining or loss of benefits. *Id*. *See also Federated Logistics and Operations v. NLRB*, 400 F.3d 920 (D.C. Cir. 2005) (finding an employer's statement that "EVERYTHING you have now goes on the table" as an unlawful threat); *TRW-United Greenfield Div. v. NLRB*, 637 F.2d 410, 420-421 (5th Cir. 1981) (finding such statements were implicit threats that the

[26] As noted below, these actions by Remblance also amounted to unlawful surveillance or creation of the impression of surveillance.

"Company would adopt a regressive bargaining posture designed to force a reduction of existing benefits"); *Plastronics, Inc.*, 233 NLRB 155, 156 (1977) (finding "begins from scratch" statement unlawful based on impression reasonably left on employees). The Board will also find vaguer statements about the negative consequences of organizing to be coercive and unlawful. *Downtown Toyota*, 276 NLRB 999 (1985), *enfd. mem. sub nom., NLRB v. Sullivan*, 859 F.2d 924 (9th Cir. 1988) (finding statement that the union is "only going to hurt you guys" unlawful).

b. Analysis

Here, Engdahl repeatedly expressed to employees that collective bargaining was a tool to decrease wages. First, he told employees that when an employer enters into a collective bargaining relationship the slate is clean on wages, benefits, and other working conditions. This statement in itself is not entirely true as it is well-settled that an employer has the duty to maintain the status quo regarding wages and benefits, even those that "have become conditions of employment by virtue of prior commitment or practice." *Alpha Cellulose Corp.*, 265 NLRB 177, 178 n.1 (1982), *enfd. mem.*, 718 F.2d 1088 (4th Cir. 1983). *See also NLRB v. Katz*, 369 U.S. 736, 743 (1962). Later, Engdahl addressed this issue again by telling employees that their competitors were unionized so that the companies could keep the wages down. Engdahl's continued illustrations of how wages are either "wiped clean" or "kept down" through means of bargaining by employers would tend to leave the lasting impression on employees that should they choose the Union as their representative, they should expect their wages to go down too. Complaint ¶ 5(g)(1).

Engdahl continued this rhetoric with higher intensity during the April 29 meeting. Here, he told employees that the truth was that the Union would hurt Respondent, all of them, and everybody in the future. These statements are very similar to the one found unlawful in

Downtown Toyota, 276 NLRB 999 (1985) (finding statement that the union is "only going to hurt you guys" unlawful). The Board would easily find these repeated threats unlawful. Complaint ¶ 5(t)(2) and 5(t)(3).

Engdahl also threatened employees during the April 29 meeting by telling them that all the Union could do is ask for things and Respondent would not have to agree to anything, nothing at all.[27] Engdahl followed that statement by telling employees that bargaining could go on forever. Engdahl's emphasis on the words "anything," "nothing," and "forever" signaled to employees that Respondent was prepared to take a regressive bargaining stance and failed to convey the "normal give and take of negotiations."

The coerciveness of Engdahl's statements is further supported by the context surrounding these statements. Just prior, Engdahl reminded employees that "the company pays wages, benefits, and sets working conditions, not the Union." This statement illustrates the basis for the caution the Supreme Court harkened in *NLRB v. Gissel Packing Co.,* 395 U.S. 575, 617 (1969). The *Gissel* Court warned that when weighing the rights of employer speech against "the equal rights of employees to freely associate," such balancing "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." *Id.* By reminding employees of their economic dependence on Respondent and then telling them that all the Union could do is ask for things without Respondent agreeing to any of it, Respondent further planted its seed of fear in employees that they would lose their benefits if they chose the Union.

[27] Engdahl's statement also violates the Act as a coercive statement of futility because Engdahl's statements imply that selecting the Union would "inevitably lead to years of delay[.]" *See Auto Nation, Inc.*, 360 NLRB No. 141, slip op. at 1 (2014) (also finding bargaining "from scratch" statements unlawful). (Complaint ¶ 5(t)(4)).

3. Respondent Created the Impression that Employees' Union Activities were under Surveillance and Instructed Employees to Ascertain and Disclose Other Employees' Union Activities

a. Legal Standard

An employer creates an unlawful impression of surveillance if its employees "would reasonably assume from the statement in question that their union activities had been placed under surveillance." *Heartshare Human Serv. of N.Y.,* 339 NLRB 842, 844 (2003). "The idea behind finding an impression of surveillance as a violation of Section 8(a)(1) of the Act is that employees should be free to participate in union organizing campaign without the fear that members of management are peering over their shoulders, taking note of who is involved in union activities, and in what particular ways." *Flexsteel Indus.*, 311 NLRB 257, 257 (1993) (quotations omitted). The Board has often found that an employer creates the impression of surveillance when it reveals specific details related to employees' union activity, but fails to reveal the source of that information. *See Royal Manor Convalescent Hosp.*, 322 NLRB 354, 362 (1996), *enfd.*, 141 F.3d 1178 (9th Cir. 1998). *See also Farm Fresh Co., Target One, LLC*, 361 NLRB No. 83, slip op. at 18-19; *Sam's Club*, 342 NLRB 620, 620-21 (2004); *Avondale Indus., Inc.*, 329 NLRB 1064, 1225 (1999); *Flexsteel Indus.,* 311 NLRB at 257.

In a similar vein, employers violate the Act when they ask their employees to ascertain and disclose the membership, activities, and sympathies of other employees, even when such requests are cloaked in other terms. *See, e.g., Bloomington-Normal Seating Co.*, 339 NLRB 191, 193 (2003), *enfd.*, 357 F.3d 692 (7th Cir. 2004) (Board affirming ALJ's finding that letter to employees requesting they let the employer know if employees are "threatened" or "harassed" about signing a union card was unlawful); *Arcata Graphics/Fairfield, Inc.*, 304 NLRB 541 (1991) (finding that employer violated the Act by telling employees to inform management if

they felt "subject to abusive treatment" by union supporters); *Sunbeam Corp.*, 284 NLRB 996, 997 (1988) (finding statement unlawful where employer told employees, "If they won't leave you alone, let me know about it").

b. Analysis

Here, Respondent's supervisors and managers repeatedly made statements to employees that would leave them with the ominous impression that their Union activity was under surveillance. On January 25, Floor Captain White told Phipps that he "heard rumors" of union activity, but failed to disclose where he received that information. (Complaint ¶ 5(f)(2)). On February 24, during a roundtable meeting with employees, including Phipps, Warehouse Manager Vaivao said that Respondent had a good idea who was organizing and that the Manager of the Meat Plant was approached about organizing. (Complaint ¶ 5(m)(1)). Vaivao also told employees on February 24 that if the Union still approached them after they told them no, they should "raise [their] hand, say hey, man, this guy is bugging me, you know." Vaivao was essentially telling employees that they should speak up and tell management that they were being bothered by the Union, and who was bothering them. (Complaint ¶ 5(m)(2)). On March 26, in another roundtable meeting, Vaivao made similar statements to employees, including union supporter Lerma, telling them that Respondent knew who the organizers were and knew that they had an agenda against Respondent. Suggesting even more detailed knowledge of employees' protected activities, Vaivao continued, saying that he knew the organizers had a meeting off-property a few weeks ago and knew who attended. (Complaint ¶ 5(n)). On April 27, Floor Captain Manning told Phipps that he knew what Phipps' had said upstairs in the break room.[28] (Complaint ¶ 5(s)(1)). Manning followed up his comment by warning Phipps that he should

[28] This allegation was originally drafted as actual surveillance, but was clarified on the record as an allegation of creating the impression of surveillance. Tr. 971:4-20.

watch his back. (Complaint ¶ 5(s)(2)). Again, on April 29, Respondent, by one of its highest ranking managers, Vice President of Operations Engdahl, told a group of employees assembled for yet another meeting that Respondent had a good idea who was behind the Union. (Complaint ¶ 5(t)(1)). On May 1, Forklift Manager Garcia told Lerma individually that he was looking for Union cards on Lerma's personal clipboard and that he had gotten a call from transportation that Lerma was putting up flyers and had handed a Union card to a transportation clerk in the breakroom and was shocked it was him. (Complaint ¶ 5(v)(2)). Finally, on May 5, when Engdahl and Vaivao met with Lerma in Engdal's office to verbally reprimand Lerma, Engdahl told Lerma that Respondent knew there were problems on the warehouse floor, that there was heckling and insulting going on, and that that there was talk of a potential slowdown. (Complaint ¶ 5(w)(2)). Engdahl admitted that he met with Lerma because employees were complaining about his union activity. In each of these instances, Respondent communicated to employees that it knew of their union activities, but it failed to disclose how it acquired that knowledge, thus illegally creating the impression among its employees that their union activities were under Respondent's close surveillance, or it directed employees to ascertain and disclose the union activities of other employees.

4. Respondent Actually Surveilled Employees' Union Activity

a. Legal Standard

Just as an employer may not create the impression that employees' union activities are under surveillance, it may not actually engage in surveillance. *Flexsteel Indus.*, 311 NLRB at 257; *see also NLRB v. Randall P. Kane, Inc.*, 581 F.2d 215, 218 (9th Cir. 1978). Although employers may observe "employees conducting their activities openly on or near company premises," *Roadway Package Sys., Inc.*, 302 NLRB 961, 961 (1991), observation of employees

becomes unlawful surveillance when it is conducted in such a conspicuous manner that it interferes with employees' protected activities. *See Alle-Kiski Med. Ctr.*, 339 NLRB 361, 364-65 (2003); *Basic Metal & Salvage Co., Inc.*, 322 NLRB 462, 464 (1996); *Carry Cos. of Ill.*, 311 NLRB 1058 (1993), *enfd. in relevant part*, 30 F.3d 922, 934 (7th Cir. 1994); *Impact Indus.*, 285 NLRB 5, 24 (1987); *Lundy Packing Co.*, 223 NLRB 139, 147 (1976).

b. Floor Captain Manning Engaged in Surveillance at Denny's

Floor Captain Manning's suspicious presence at Denny's on January 28 violated the Act. Manning stationed himself near the front or outside the restaurant and spoke with employees as they left, telling them that he was not for the Union. The coerciveness of Manning's presence is vividly illustrated by the fact that Wallace called his coworkers to warn them Manning was there as soon as he recognized Manning's distinguished truck in the parking lot. Further, the Union meeting broke up as soon as Manning arrived. (Complaint ¶ 5(j)).

c. Manager Remblance Surveilled Employees on Break

On April 29 – just three days after Phipps announced that he was a lead organizer – Respondent's Safety Manager Remblance engaged in further surveillance of employees' union activities, this time inside the plant. That day, after spotting Phipps talking to another employee from 60 to 70 yards away, Remblance, who was not in Phipps' supervisory chain and would not normally approach Phipps, approached the two, asking what they were talking about, questioning them about whether they were on break, and sticking around and talking to them until he instructed them to return to work. This unusual action by Remblance amounted to surveillance of Phipps, or at least created the impression of surveillance.[29] *Basic Metal & Salvage Co., Inc.*, 322 NLRB 462, 464 (1996) (noting that "unusual activity" such as "standing very close to the

[29] As noted above, Remblance's interaction with Phipps also amounted to an unlawful interrogation.

union agent in order to interrupt" protected activity signals a violation); *Impact Indus.*, 285 NLRB 5, 24 (1987) (Board affirming ALJ finding that employer unlawfully observed protected activity based on company officials' unusual conduct). (Complaint ¶ 5(u)(2)).

d. Supervisor Garcia Searched for Union Cards

On May 1, Forklift Manager Garcia engaged in even more blatant surveillance, physically searching through union supporter Lerma's personal clipboard and later admitting he had been looking for union cards. This conduct demonstrates Respondent's active pursuit of information about which employees supported the Union. *See Far W. Fibers, Inc.*, 331 NLRB 950, 950-51 (2000) (finding that "Respondent engaged in actual surveillance by deceptively obtaining the credit card receipt of [a suspected employee] union organizer"). (Complaint ¶ 5(v)(1)).

5. Respondent Continually Solicited Employees' Grievances

a. Legal Standard

The Board has held that an employer's solicitation of grievances chills employees' unionization efforts because it demonstrates both that employees' efforts to unionize are unnecessary and that the employer will only improve working conditions as long as the workplace remains union-free. *See Ctr. Serv. Sys. Div.*, 345 NLRB 729, 730 (2005); *Alamo Rent-A-Car*, 336 NLRB 1155, 1155 (2001). Further, "an employer cannot rely on past practice to justify solicitation of grievances where the employer 'significantly alters its past manner and methods of solicitation.'" *Walmart, Inc.*, 339 NLRB 1187, 1187 (2003) (quoting *Carbonneau Industries*, 228 NLRB 597, 598 (1977)).

b. Analysis

Respondent's solicitation of employee concerns and complaints during roundtable

meetings violated the Act. Respondent began soliciting grievances through what it described as a "roundtable process" beginning soon after it learned of the employees' organizational efforts. During Wright's meeting, on the heels of the large anti-union Town Hall meeting on January 28, she asked employees what the issues were in the warehouse and informed them that she would take those concerns to management. (Complaint ¶ 5(h)).

At a meeting on February 5, Vaivao prodded employees to give their feedback on what was bothering them. He assured them that he was taking notes because Respondent was committed to removing the obstacles in the warehouse. Towards the end of the meeting, Wright followed up by addressing concerns that employees had expressed in prior meetings. (Complaint ¶ 5(k)).

In a meeting in mid-February, Vaivao not only played an anti-union video, but opened the floor for discussion regarding employee concerns at the warehouse. After several employees aired their grievances, Wright began discussing wages, just as she had in the February 5 meeting. (Complaint ¶ 5(l)).

Respondent will likely argue that it did not violate the Act by soliciting grievances in these meetings because it has a past practice of soliciting employee feedback. However, although Respondent has held roundtable meetings in the past, these meetings were markedly different. For example, throughout these meetings, Vaivao clearly connected all the meetings when he told employees on February 5, that he was following up on Wright's roundtable meeting and on the big Town Hall meeting (a meeting that was clearly related to the Union). Moreover, it is no coincidence that Wright's first meeting was held immediately following the anti-union meeting. Finally, the meeting in mid-February was clearly different from prior roundtables in that Respondent played an anti-union video before asking employees what they were concerned

about. In sum, Respondent cannot hide behind the fact that it held a roundtable meeting in October 2013 to justify its blatant signals to employees from the end of January through February that if they refrained from choosing the Union, Respondent would improve their working conditions.

6. Respondent Granted Benefits to Discourage Union Activity

a. Legal Standard

Promising and granting increased benefits after a union campaign commences squarely violates Section 8(a)(1) of the Act. As the Supreme Court has observed, "The danger inherent in well timed increases in benefits is the suggestion of a fist inside a velvet glove. Employees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged." *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964).

b. Respondent's Lay-Off Guarantee was Unlawful

Respondent directly addressed one of the main concerns supervisors heard throughout the roundtable process by guaranteeing that employees would not be in jeopardy of a lay-off during the slow summer season as was commonly the practice. Engdahl presented employees with Respondent's commitment in writing on April 29. There is no doubt that Respondent was well-aware of the union campaign at this time; as soon as Engdahl made this velvety promise, his iron fist came crashing down on employees as he made threats of futility and warned them that he knew who the organizers were. The coercive nature of Respondent's conduct could be lost on no one.

c. Respondent's Wage Increase was Unlawful

The wage increases Respondent granted to select groups of workers is likewise unlawful. In *Jewish Home for the Elderly of Fairfield County*, 343 NLRB 1069, 1087-89 (2004), *enfd.*, 174 Fed. Appx. 631 (2d Cir. 2006), the Board addressed a situation in which an employer announced and implemented a wage increase at a time when the employer was aware that a union was attempting to organize its employees: "Although the Board has held that the grant of benefits during an election campaign is not per se unlawful, the Board will draw an inference of improper motivation and interference with employee free choice where the evidence shows that employees would reasonably view the grant of benefit as an attempt to interfere with or coerce them in their choice of representative."[30] *Id.* at 1089. Here, Respondent granted unprecedented wage increases at the height of the campaign – shortly after Phipps and others began opening supporting the Union by passing out flyers in the warehouse. The wage increase came at about the same time Respondent guaranteed that they would not lay anyone off. Employees would likely view Respondent's sudden generosity as an attempt to sway their support away from the Union, thus interfering with their free choice in violation of Section 8(a)(1) of the Act. (Complaint ¶ 5(z)).

7. McClelland's Letter Violated the Act in Numerous Ways

McClelland's May 8 letter instructed employees to report the union activities of others and threatened employees with legal prosecution for engaging in union activity in violation of

[30] Moreover, "[t]he Board held that the timing of an employer's announcement of wage increases during a union campaign may be unlawful even if the wage increase itself does not violate the Act." *Id.* at 1089-90 (citing *Mercy Hosp. Mercy Sw. Hosp.*, 338 NLRB 545 (2002)). *See also Pac. Coast M.S. Industries Co., Ltd.*, 355 NLRB 1422, 1438 (2010) (finding a violation of Section 8(a)(1) because the respondent "failed to demonstrate that it had crystallized its wage increase decision before it learned of the union activity or that the grant would have occurred if the Union had not been on the scene"); *Spectrum Health-Kent Cmty. Campus*, 353 NLRB 996, 1005 (2009), *incorporated by reference*, 355 NLRB 580 (2010), *enfd.*, 647 F.3d 341 (D.C. Cir. 2011) ("In this case, the 8(a)(1) violation includes the announcement of anticipated further wage increases in October").

Section 8(a)(1) of the Act. McClelland urged employees to "promptly report" conduct including "unlawful bullying" and "unlawfully coercive" behavior, "however minor."

Respondent will likely argue that it was merely addressing legitimate employee complaints of harassment. However, the record is devoid of any evidence of violence or actual harassment. Rather, the record is replete with evidence that employees were merely complaining about being approached by union supporters. In fact, Vaivao continually told employees during his union prevention meetings that employees felt harassed because they were fed up with being approached to sign union cards or that employees were coming to him with concerns about how the Union would affect their financial affairs. Aside from the facially broad and ambiguous language in the letter which was sent in during an organizational campaign, any reasonable employee would link Vaivao's comments to the message they received in the letter. Plainly, McClelland's letter was a thinly veiled reference to the ongoing union activity in the warehouse and was "tantamount to a request that the employees report persistent attempts to persuade and would therefore tend to restrain the union proponent from attempting to persuade any employee through fear that his conduct would be reported to management." *Arcata Graphics/ Fairfield, Inc.*, 304 NLRB 541, 542 (1991). (Complaint ¶ 5(x)(2)).

The coercive nature of this request is further amplified by McClelland's threat that such conduct will be met with legal prosecution "to the fullest extent of the law," a threat, which itself violates of Section 8(a)(1) of the Act. *See RGC (USA) Mineral Sands, Inc.*, 332 NLRB 1633, 1638 (2001), *enfd.*, 281 F.3d 442 (4th Cir. 2002) ("It is equally clear that threats to institute legal action because of an employee's protected activity violate Section 8(a)(1) of the Act.") (citing *Braun Elec. Co.*, 324 NLRB 1 (1997); *Holy Cross Hosp.*, 319 NLRB 1361, 1366 (1995)). (Complaint ¶ 5(x)(3)).

Additionally, McClelland communicated the promulgation of a new rule, prohibiting employees from engaging in "unlawfully coercive behavior" or "bullying." (Complaint ¶ 5(x)(1)). Respondent will likely rely on *Adtranz ABB Daimler-Benz Transp. V. NLRB*, 253 F.3d 19 (D.C. Cir. 2001) or the *General Counsel Memorandum 15-04*, "Report of the General Counsel Concerning Work Rules," March 18, at *11-12, to show that it did not violate the Act by promulgating this rule. In both the memorandum and in *Adtranz*, similar so-called "civility" rules were condoned. However, in *Adtranz*, the General Counsel never asserted that the rule at issue was initiated in response to any union activity, and the reviewing court only considered whether the communication was unlawful on its face. 253 F.3d at 25-26.

Here, Respondent promulgated the rule in direct response to union activity as evidenced throughout the record. First, the letter was sent just three days after employee Lerma was disciplined for soliciting union support from his co-workers, an activity that Respondent characterized as "heckling." Moreover, as discussed above, the only evidence of harassment in the workplace stemmed directly from other persistent, yet protected, union activity. Even Engdahl admitted that the complaints of harassment he received within about a week prior to McClelland's letter did not amount to actual harassment. Clearly, there were no legitimate concerns of violence or harassment and this letter, prohibiting employees from engaging in certain activity, was sent in direct response to protected union activity,[31] thus squarely violating the Act under the second prong articulated in *Lutheran Heritage*, 343 NLRB 646, 647 (2004).[32] (Complaint ¶ 5(x)(1)).

[31] While the record supports the theory that the letter was sent in response to union activity, CGC also points to GC Ex. 29 at 15 where Respondent admits in its June 8 Position statement that, "the intent of the letter was to stop workplace harassment. Several employees complained to senior Shamrock Foods management that co-workers were pressuring or harassing them *because of union activity*." (emphasis added).

[32] "If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon a showing of one of the following: . . . (2) the rule was promulgated in response to union activity[.]"

8. Respondent Disparately Enforced its No-Distribution Policy by Confiscating Union Literature

While employers can maintain rules against solicitation during working time in working areas and rules against distribution of literature in working areas, a no-solicitation or no-distribution rule which is valid on its face may be unlawful if the rule was discriminatorily promulgated or enforced. *See, e.g., Reno Hilton Resorts,* 320 NLRB 197 (1995). Further, confiscation of union literature, which employees have a well-established right to possess, is unlawful, even in areas where an employer could lawfully prohibit distribution of literature. *Manor Care of Easton, PA, LLC*, 356 NLRB No. 39, slip op. at 4 (2010), *enfd. on other grounds*, 611 F.3d 1139 (D.C. Cir. 2011).

Here, beginning on May 25 and continuing through June, Sanitation Supervisor Garzon confiscated union literature from the break room, sometimes even picking up flyers from between the arms of employees looking at them.[33] (Complaint ¶ 5(y)(2) and ¶ 5(aa)). Although Respondent may argue that it was merely enforcing its distribution policy, Garzon's actions interfered with distribution and possession of union literature in non-working areas, and Garzon only began confiscating literature from the break room after Phipps began openly supporting the Union. In fact, evidence showed that Garzon's "routine cleaning" was directly aimed at ridding the break room of Union literature. This change in practice as a "countermeasure against the union campaign" was unlawful. *Intertape Polymer Corp.*, 360 NLRB No. 114, slip op. at 1 (2014) (citing *Bon Marche*, 308 NLRB 184, 185 (1992).

C. Respondent Discriminatorily Discharged and Disciplined Employees, in Violation of Section 8(a)(3) of the Act

[33] After taking the flyers from two employees that she supervises, Garzon asked them if they wanted the flyers back. This question, directly aimed at determining the sympathies of the employees, amounts to an unlawful interrogation, especially considering the backdrop of overt hostility Respondent showed towards the union activity in the warehouse. (Complaint ¶ 5(y)(1)).

1. Legal Standard

Section 8(a)(3) of the Act provides that it shall be an unfair labor practice for an employer "by discrimination in regard to hire or tenure of employment . . . to encourage or discourage membership in any labor organization." 29 U.S.C. § 158(a)(3). Thus, this section of the Act protects employees' Section 7 right to form, join, or assist a union without being subjected to retaliation by their employers. *See, e.g., Nabors Alaska Drilling, Inc. v. NLRB*, 190 F.3d 1008, 1014 (9th Cir. 1999) ("An employer commits an unfair labor practice in violation of § 8(a)(1) & (3) if it discharges an employee because of the employee's union activity"). In this case, Respondent did just that when it fired Wallace after singling him out as a perceived Union leader and reprimanding Lerma for his persistent advocacy for the Union.

Where an employer asserts that it took an adverse action against en employee for reasons other than his or her protected activities, to establish a violation of the Act, the General Counsel must make a prima facie showing "sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd*., 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transp. Mmgt. Corp*., 462 U.S. 393 (1983). This prima facie showing involves four elements: union or protected activity, knowledge, animus, and adverse action. *Roadway Express*, 327 NLRB 25, 26 (1998).

Cases analyzing adverse action under *Wright Line* are treated as presenting either a question of "dual motivation" or one of "pretext." In a dual motivation case, the "employer defends against a § 8(a)(3) charge by arguing that, even if an invalid reason might have played some part in the employer's motivation, the employer would have taken the same action against the employee for a permissible reason." *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d

212, 223 (D.C. Cir. 2005). If the employer cannot demonstrate, by a preponderance of the evidence, that it would have taken adverse action against the employee for the permissible reason, then its rebuttal defense fails and a violation will be found. In a pretext case, i.e., a case in which the "reasons given for the employer's action are . . . either false or not in fact relied upon . . . the employer fails by definition to show that it would have taken the same action for those reasons, and thus there is no need to perform the second part of the *Wright Line* analysis." *SFO Good-Nite*, supra, 352 NLRB 268 (2008). See also *Rood Trucking Co*., 342 NLRB 895, 897–898 (2004); *Case Farms of N. Carolina, Inc.*, 353 NLRB 257, 259 (2008).

Where an employer asserts that it took action against an employee because of misconduct during the course of his or her protected activity, the Board assesses whether the employee's conduct was so egregious that he or she must lose the protection of the Act. *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). In determining whether conduct satisfies that standard, the Board weighs the following factors: (1) the place of the discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was provoked in any way by an employer's unfair labor practices. *Id.*

The Board affords broad leeway to employees engaging in protected activities. In applying the first *Atlantic Steel* factor, the Board has held that, where an employer chooses to address employees as a group about work-related matters, it should reasonably expect that employees will react on the spot, such that the place of the discussion does not weigh in favor of loss of the Act's protection. *Kiewit Power Constructors Co.*, 355 NLRB 708 (2010), *enfd.*, 652 F.3d 22, 25 (D.C. Cir. 2011); *Noble Metal Processing, Inc.*, 346 NLRB 795, 796 (2006). Under the second *Atlantic Steel* factor, the subject matter of the discussion weighs heavily in favor of protection when an employee's disputed outburst occurs while he is raising union or concerted,

work-related concerns to his employer. *See , e.g., Felix Indus., Inc.*, 339 NLRB 195, 196 (2003), *enfd. mem.*, 2004 WL 1498151 (D.C. Cir. 2004); *Beverly Health & Rehab. Servs., Inc.*, 346 NLRB 1319, 1322 (2006) (discussion of merits of grievance seeking reinstatement of coworker was protected subject matter); *Consumers Power Co.*, 282 NLRB 130, 131 (1986). The third *Atlantic Steel* factor generally only weighs against in favor of loss of the Act's protection if an employee's conduct is opprobrious, for example because it involved threats, violence, or extreme profanity or insubordination. *See Kiewit Power Constructors Co. v. NLRB*, 652 F.3d 22, 27-29 (D.C. Cir. 2011); *see also Stanford Hotel*, 344 NLRB 558, 564 (2005) . Where an employee's conduct was not provoked by an employer's unfair labor practices, the Board does not apply that factor, and, instead, relies on the other three factors. *Noble Metal Processing, Inc.*, 346 NLRB at 799.

2. Respondent Discharged Wallace Because of His Union and Other Protected Activities, in Violation of Section 8(a)(1) and (3) of the Act

a. Wallace Engaged in Union and Other Protected Activities

Wallace engaged in a range of protected activity: both union and concerted. First, he asked questions about unionization during the Town Hall meeting on January 28 and signed a union card on that same day. Then, Wallace spoke up again at the second Town Hall meeting on March 31. This time, his questions were directly related to Respondent's health benefits, pushing back on the changes Respondent recently made. His coworkers erupted in cheers and applause after Wallace asked his questions. "[T]he Board has consistently found activity concerted [and protected under the Act] when, in front of their coworkers, single employees protest changes to employment terms common to all employees." *Worldmark by Wyndam*, 356 NLRB No. 104, slip op. at 3 (2011). Not only was his conduct textbook protected, concerted

activity, but it also made him stand out to Respondent as someone who strongly supported the Union's organizing campaign.

b. Respondent Harbored Animus Towards Wallace's Protected Activity

The record is teeming with evidence of Respondent's hostility toward Wallace's protected activity. To begin with, Vaivao's statement at the time of discharge that Wallace should "find another job with better benefits," demonstrates hostility. Undeniably, Vaivao was referring to Wallace's questions at the March 31 meeting. Respondent's shifting reasons for terminating Wallace also demonstrate hostility. *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (finding that "shifting reasons constitute evidence of discriminatory motivation"). In their position statement provided during the investigation, Respondent stated that Wallace was "belligerent" and "interrupted" senior management at the March 31 meeting. At the hearing, Respondent's witnesses testified, rather incredulously, that Wallace made a dismissive gesture before he walked out of the meeting.

Further, the unusual involvement of high level management in Wallace's discharge supports a finding of animus. Beake, the Senior Vice President of Human Resources, and Daniels, Beake's soon-to-be successor, both testified that they do not normally get involved in the discipline of warehouse associates. Taking such notice to Wallace, after his coworkers reacted to his comments at the meeting, shows Respondent's hostility toward Wallace's protected activity. Moreover, Respondent deviated from its long-held progressive discipline policy when Daniels (who was aware of the policy) decided to skip all five steps and jump straight to discharge, again, evidencing Respondent's hostility toward Wallace's conduct. *Detroit Newspapers*, 342 NLRB 1268, 1271-72 (2004) (finding unlawful motivation based, in part, on employers failure to follow its own progressive discipline policy).

Respondent's apparent hostility is also supported by evidence of disparate treatment. *Fluor Daniel, Inc.*, 304 NLRB 970, 970 (1991). The record shows that Respondent treated Wallace differently based on its belief that Wallace was a leader in the campaign. Neither Beake nor Daniels could give any examples of employees that have been fired for similar reasons. And previously, while there was no ongoing organizing campaign, Phipps was not disciplined or discharged for telling Beake in a Town Hall meeting, among other things, that "Shamrock didn't give a rat's ass about its employees."

Respondent's other unfair labor practices, including its coercive interrogation of Wallace and its attempt to have him sign a severance agreement that would interfere with his ability to communicate with his coworkers about terms and conditions of employment, including his discharge, further support a finding of unlawful motivation.[34] *See*, *e.g.*, *Mid-Mountain Foods*, 332 NLRB 251, 251 n.2 (2000), *enfd. mem.*, 11 Fed. Appx. 372 (4th Cir. 2001) (finding unlawful motivation based on prior finding that respondent engaged in unfair labor practices, and finding unlawful motivation with respect to adverse actions against some discriminatees based on unlawful conduct directed toward other discriminatees).

Finally, Engdahl's comments to other employees during the April 29 meeting shed light on Respondent's hostility towards Wallace's questions at the Town Hall. At likely the most contentious meeting Respondent held with employees, Engdahl made a rather "insightful" comment of his own. Shortly after telling employees that the Union would hurt everybody in the future, he said, "People are still upset over our insurance." Then, he told them they should be "less emotional" about it. Engdahl made these comments just three weeks after Wallace had been fired. The context of Engdahl's comments shed light on how Respondent's upper

[34] The terms of Wallace's separation agreement will be addressed below.

management clearly connected Wallace's discord with the health care changes to the employees' support for the union.

c. Respondent's Reasons for Wallace's Discharge Are Pretext, and Respondent Therefore Has Not Met Its Burden of Proving It Would Have Taken the Same Action Regardless of Wallace's Protected Activity

Although Respondent contends that it had a legitimate, non-discriminatory reason for discharging Wallace – that Wallace was insubordinate when he made a gesture and left a mandatory meeting five minutes early – it wholly failed in meeting its burden of proof. Respondent will likely argue that because it did not discharge any other employees who asked questions about health care during the March 31 meeting, that it fired Wallace because of his alleged misconduct. The key distinction though, is that only Wallace's questions garnered applause and support from his coworkers.

Respondent is unable to show that it would have fired Wallace regardless of his protected activity because its reasons are nothing but pretext. As discussed above, Respondent's shifting and incredulous reasons for firing Wallace prove that Respondent's justifications were concocted after the fact to cover up its own wrong doing. *MCPC, Inc.*, 360 NLRB No. 39, slip op. at 16 (2014) (finding that shifting reasons for adverse action is evidence of pretext). This conclusion is further supported by the differing actions of its own supervisors. Notably, Wallace's supervisor, Myers, knew that Wallace left the meeting early and was not fazed. He neither counseled Wallace for leaving early, nor made him return to the mandatory meeting. This shows that leaving early, which was stressed by Daniels as one of the reasons Wallace was terminated, was not actually a big deal. In fact, the one supervisor who did not hear the reaction from Wallace's coworkers, accepted Wallace's early departure from the meeting.

Moreover, the simple fact that Respondent has a history of tolerating even worse behavior from employees in the absence of protected union activity also makes it impossible for Respondent to prove that it would have fired Wallace even if it had not pegged him as a leader in the campaign.

In the event that it is found that Respondent did, in fact, discharge Wallace for belligerently interrupting Respondent's Senior Vice President of Human Resources in a meeting or for making a dismissive gesture and abruptly leaving the meeting, that conduct was closely intertwined with Wallace's protected concerted activity—his raising concerns about the cost of employees' health insurance in a meeting conducted by Respondent. Thus, in that event, the standards set forth in *Atlantic Steel* should be applied in assessing whether Wallace's discharge was unlawful. Applying the *Atlantic Steel* factors, Wallace did not engage in any activity that caused him to lose the protection of the Act. Since he made his comments in a meeting called by Respondent to discuss work-related issues with employees, Respondent could reasonably expect that employees would respond to its announcements, so that the place of the discussion weighs against loss of protection of the Act. Since his comments amounted to protected, concerted complaints about the cost of health insurance, the subject matter of the comments weighs heavily against loss of protection of the Act. Since Wallace did not make any threats, engage in any violent conduct, use profanity, or engage in any extreme insubordination, and, instead, merely made critical, protected comments about employees' health insurance and then allegedly waived his hand in a dismissive fashion and left the meeting, the third factor also weighs against loss of protection of the Act. Since there is no allegation that Respondent engaged in any unfair labor practices in the meeting in which Wallace made his comments, the fourth *Atlantic Steel* factor should not be applied. Since all three remaining factors weigh in favor of Wallace's retention of

the protection of the Act, even if it were found that Respondent discharged Wallace for his alleged belligerent interruptions and dismissive gesture, his discharge was still unlawful.

Accordingly, the General Counsel respectfully requests that the ALJ find that Respondent violated Section 8(a)(3) of the Act by discharging Wallace because it believed that Wallace was leading the Union efforts and to discourage others from supporting the Union.

d. Respondent's Separation Agreement Violates the Act

Respondent, through Vaivao and Allen, attempted to silence Wallace after they fired him. They gave Wallace a Separation Agreement that severely limited what he could say about his discharge, Respondent's working conditions, or about the company in general. (Complaint ¶ 5(r)(1) through (4)). Several of the rules stated in the agreement violate Section 8(a)(1) of the Act because the terms would reasonably tend to chill Wallace in the exercise of his rights guaranteed under Section 7. *Lutheran Heritage Village*, 343 NLRB 646 (2004).

In considering whether a rule is unlawful, the Board will give it a "reasonable reading" and refrains from reading phrases in isolation. Id. If a rule does not explicitly prohibit Section 7 activity, it may nonetheless be unlawful if "employees would reasonably construe the language to prohibit Section 7 activity" or if the rule was promulgated in response to Section 7 activity. Id. at 647. Any ambiguity in a rule is construed against the employer that promulgated it because employees "should not have to decide at their own peril" whether to engage in a protected activity that may be implicated by an ambiguously worded work rule. *Flex Frac*, 358 NLRB No. 127, slip op. at 2 (2012); *See also Lafayette Park Hotel*, 326 NLRB 824, 828 (1998), *enfd. mem.*, 203 F.3d 52 (D.C. Cir. 1999).

Because employees have a right to discuss wages, hours, and other working conditions with fellow employees, as well as with non-employees, confidentiality policies that restrict that

right violate the Act under Section 8(a)(1). Here, Respondent's Separation Agreement does just that. Paragraphs 9, 10, and 12 of the Separation Agreement contain broad prohibitions on disclosing "confidential" information either contained in the agreement itself (paragraph 9, "Because the information in this Separation Agreement is confidential, it is agreed that you will not disclose the terms . . . to anyone."), or other information presumably encompassing information related to Wallace's working conditions. "Employees have a Section 7 right to discuss discipline[.]" And, "[s]uch discussions are vital to employees' ability to aid one another in addressing employment terms and conditions with their employer. Accordingly, an employer may restrict those discussions only where the employer shows that it has a legitimate and substantial business justification that outweighs employees' Section 7 rights." *Banner Estrella Medical Ctr.*, 362 NLRB No. 137, slip op. at 3 (2015) (citations omitted). Restricting Wallace from discussing the agreement is essentially prohibiting him from discussing his discharge, a clear violation of the Act.

For example, paragraph 10 states that "[a]ll information . . . related to [Shamrock's] business, including . . . *personnel* or corporate information . . . are presumed to be confidential." (emphasis added). In *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 21 (2011), the Board affirmed the ALJ's finding that a rule prohibiting unauthorized disclosure of information within personnel files was unlawful because such information would "reasonably include . . . wages and salary information . . . and other information that employees are entitled to know and to share with coworkers." The rule at issue in paragraph 10 is even broader than in H*yundai America Shipping* as "personnel and corporate information" could extend to working conditions and other matters that would not be contained in personnel files. Further, paragraph 12 prohibits the disclosure of such confidential information "for any reason". There is no doubt

that employees have the right to discuss their working conditions with other employees, unions, or even government agencies. *Id.* at 21. Therefore, the expansive nature of the Employer's prohibitions set forth in these paragraphs would likely chill employees in the exercise of their Section 7 rights, thus violating Section 8(a)(1) of the Act.

Finally, Respondent prohibited Wallace from making "any disparaging remarks" that would be "detrimental" to Respondent in paragraph 13 of the agreement. Employees have the right to criticize an employer's labor policies and treatment of employees, including in a public forum. *See Quicken Loans, Inc.*, 361 NLRB No. 94, slip op. at 1 n.1 (2014). Respondent's rule would reasonably be construed, at a minimum, of prohibiting activity such as that. Thus, this prohibition also violates Section 8(a)(1) of the Act.

Respondent may argue that because Wallace never signed the agreement, it did not promulgate or maintain these unlawful rules. However, that only shows that Respondent will be unable to enforce the terms.

e. Wallace Should Be Made Whole, Including through Payment for Search-For-Work and Work-Related Expenses, Regardless of Whether These Amounts Exceed Interim Earnings

As specifically requested in the Complaint, in addition to being entitled to all traditional remedies for an unlawful discharge, Wallace is entitled to be made whole for search-for-work and work-related expenses regardless of whether these amounts exceed any interim earnings. Discriminatees are entitled to reimbursement of expenses incurred while seeking interim employment, where such expenses would not have been necessary had the employee been able to maintain working for respondent. *Deena Artware, Inc.*, 112 NLRB 371, 374 (1955); *Crossett Lumber Co.*, 8 NLRB 440, 498 (1938). These expenses might include: increased transportation

costs in seeking or commuting to interim employment[35]; the cost of tools or uniforms required by an interim employer[36]; room and board when seeking employment and/or working away from home[37]; contractually required union dues and/or initiation fees, if not previously required while working for respondent[38]; and/or the cost of moving if required to assume interim employment.[39]

Until now, however, the Board has considered these expenses as an offset to a discriminatee's interim earnings rather than calculating them separately. This has had the effect of limiting reimbursement for search-for-work and work-related expenses to an amount that cannot exceed the discriminatees' gross interim earnings. *See W. Texas Utilities Co.,* 109 NLRB 936, 939 n.3 (1954)("We find it unnecessary to consider the deductibility of [the discriminatee's] expenses over and above the amount of his gross interim earnings in any quarter, as such expenses are in no event charged to the Respondent."); *see also N. Slope Mech.*, 286 NLRB 633, 641 n.19 (1987). Thus, under current Board law, a discriminatee, who incurs expenses while searching for interim employment, but is ultimately unsuccessful in securing such employment, is not entitled to any reimbursement for expenses. Similarly, under current law, an employee who expends funds searching for work and ultimately obtains a job, but at a wage rate or for a period of time such that his/her interim earnings fail to exceed search-for-work or work-related expenses for that quarter, is left uncompensated for his/her full expenses. The practical effect of this rule is to punish discriminatees, who meet their statutory obligations to seek interim work,[40]

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[35] *D.L. Baker, Inc.*, 351 NLRB 515, 537 (2007).

[36] *Cibao Meat Products & Local 169, Union of Needle Trades, Indus. & Textile Employees*, 348 NLRB 47, 50 (2006); *Rice Lake Creamery Co.*, 151 NLRB 1113, 1114 (1965).

[37] *Aircraft & Helicopter Leasing*, 227 NLRB 644, 650 (1976).

[38] *Rainbow Coaches*, 280 NLRB 166, 190 (1986).

[39] *Coronet Foods, Inc.*, 322 NLRB 837 (1997).

[40] *In Re Midwestern Pers. Servs., Inc.*, 346 NLRB 624, 625 (2006)("To be entitled to backpay, a discriminatee must make reasonable efforts to secure interim employment.").

but who, through no fault of their own, are unable to secure employment, or who secure employment at a lower rate than interim expenses.

Aside from being inequitable, this current rule is contrary to general Board remedial principles. Under well-established Board law, when evaluating a backpay award the "primary focus clearly must be on making employees whole." *Jackson Hosp. Corp.*, 356 NLRB No. 8 at *3 (Oct. 22, 2010). This means the remedy should be calculated to restore "the situation, as nearly as possible, to that which would have [occurred] but for the illegal discrimination." *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941); *see also Pressroom Cleaners & Serv. Employees Intl Union, Local 32bj*, 361 NLRB No. 57 at *2 (Sept. 30, 2014)(quoting *Phelps Dodge*). The current Board law dealing with search-for-work and work-related expenses fails to make discriminatees whole, inasmuch as it excludes from the backpay monies spent by the discriminatee that would not have been expended but for the employer's unlawful conduct. Worse still, the rule applies this truncated remedial structure only to those discriminatees who are affected most by an employer's unlawful actions—i.e., those employees who, despite searching for employment following the employer's violations, are unable to secure work.

It also runs counter to the approach taken by the Equal Employment Opportunity Commission and the United States Department of Labor. *See* Enforcement Guidance: Compensatory and Punitive Damages Available under § 102 of the Civil Rights Act of 1991, Decision No. 915.002, at *5, *available at* 1992 WL 189089 (July 14, 1992); *Hobby v. Georgia Power Co.*, 2001 WL 168898 at *29 (Feb. 2001), *aff'd Georgia Power Co. v. US. Dep 't of Labor*, No. 01-10916, 52 Fed.Appx. 490 (Table) (11th Cir. 2002).

In these circumstances, a change to the existing rule regarding search-for-work and work-related expenses is clearly warranted. In the past, where a remedial structure fails to achieve its

objective, "the Board has revised and updated its remedial policies from time to time to ensure that victims of unlawful conduct are actually made whole. . ." *Don Chavas, LLC*, 361 NLRB No. 10 at *3 (Aug. 8, 2014). In order for employees truly to be made whole for their losses, the Board should hold that search-for-work and work-related expenses will be charged to a respondent regardless of whether the discriminatee received interim earnings during the period.[41] These expenses should be calculated separately from taxable net backpay and should be paid separately, in the payroll period when incurred, with daily compounded interest charged on these amounts. *See Jackson Hosp. Corp.*, 356 NLRB No. 8 at *1 (Oct. 22, 2010)(interest is to be compounded daily in backpay cases).

3. Respondent Disciplined Lerma Because He Engaged in Union Activity, in Violation of Section 8(a)(3) of the Act

a. Lerma Engaged in Protected Union Activity

Employee Lerma engaged in a lot of union activity. In his role on the organizing committee, Lerma often spoke with his coworkers about the Union and encouraged his coworkers to sign union authorization cards both in and out of the warehouse.

b. Respondent Knew of Lerma's Union Activity

Respondent's knowledge of Lerma's union support is demonstrated by Garcia's searching through Lerma's personal clipboard on May 1, admittedly to look for union cards because he was surprised to hear that Lerma was collecting cards. Respondent's knowledge is also demonstrated by the Engdahl's and Vaivao's statements during the disciplinary meeting.[42]

[41] Award of expenses regardless of interim earnings is already how the Board treats other non-employment related expenses incurred by discriminatees, such as medical expenses and fund contributions. *Knickerboxer Plastic Co., Inc.*, 104 NLRB 514, 516 at *2 (1953).

[42] Respondent will likely argue that this meeting was not disciplinary. However, even Vaivao described it as the first step of Respondent's disciplinary policy: Counseling. Even without relying on semantics, this meeting was clearly disciplinary in nature as Engdahl and Vaivao repeatedly reprimanded Lerma by telling him that his conduct would not be tolerated in the future. Moreover, the audio recording of the meeting speaks for itself.

For example, Vaivao talked about how employees were perceiving Lerma's "opinions" as having an impact on their wages. Engdahl also referred to Lerma as "heckling" and "insulting" others in the warehouse. No doubt, these were thinly veiled references to Lerma's union activity, showing that Respondent was well aware that Lerma was ushering support for the Union.

If there was still any doubt as to whether Respondent knew of Lerma's union activity, Engdahl admitted it. He said that he had this meeting with Lerma because employees complained about Lerma's persistent union activity.

c. Respondent Was Hostile Towards Lerma's Union Activity

Again, the record is teeming with evidence of Respondent's hostility towards union activity in the warehouse, particularly, Lerma's. The strongest evidence in support of Respondent's unlawful motivation comes straight from Engdahl's mouth during the meeting. In referencing the conduct that would not be tolerated, he vaguely cited "problems" on the floor, along with "heckling," "insulting," and talk of a "potential slowdown."[43] Engdahl warned that Lerma could get in serious trouble for any of that.[44] The timing of this verbal reprimand, together with Engdahl's apparent references to Lerma's protected activities and overly broad warning about such activities, strongly supports a finding of unlawful motivation. *See Pioneer Hotel*, 276 NLRB 694, 698 (1985) (adopting ALJ's finding of union animus where a supervisor threatened employee with consequences for engaging in union activity).

[43] In doing so, Respondent promulgated a rule prohibiting employees from heckling or insulting each other. Not only was this rule promulgated in response to union activity, but it is overly broad and discriminatory because it used ambiguous terms, such as "heckling" and "insulting" that employees would reasonably understand to prohibit them from engaging in Section 7 activities. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 at 647. (Complaint ¶ 5(w)(3)).

[44] Engdahl and Vaivao repeatedly threatened Lerma throughout the meeting in violation of Section 8(a)(1) of the Act by telling him that his conduct would not be tolerated, by saying that he could get in serious trouble, and by implying that he could be fired when they told him that he was valuable employee and that Respondent did not want to lose anybody. (Complaint ¶ 5(w)(1)).

d. Respondent's Reasons for Lerma's Discipline Are Pretext, and Respondent Therefore Has Not Met Its Burden of Proving It Would Have Taken the Same Action Regardless of Wallace's Protected Activity

Respondent has not shown that it would have disciplined Lerma, regardless of his union activity. Respondent will likely argue that Engdahl met with Lerma because (1) he had to deal with the harassment complaints, or (2) Lerma was disrupting its operations by not making his drops for certain employees who did not support the Union.

However, neither of those justifications hold any weight. First, Engdahl conceded that the employees' complaints about Lerma did not actually amount to harassment.[45] Second, Respondent failed to prove that Lerma actually engaged in a slowdown. In fact, the only evidence that Respondent put forth was hearsay evidence in that Engdahl testified that employees complained about Lerma not making certain drops. None of Respondent's many supervisors who testified said that they saw him do this or that they discovered it through looking at production reports. Moreover, Lerma testified that he gets paid based on the number of drops he makes and that he maxes out 99 percent of the time. Tr. 849:23-850:21. Respondent completely failed to rebut Lerma's testimony either through documentary evidence or testimony. Finally, aside from briefly and vaguely mentioning "some potential slow down on certain folks who are not sharing a similar point of view," neither Engdahl nor Vaivao questioned Lerma about whether he was doing this. Because Respondent failed to show that it investigated the allegations or "even establish that a slowdown actually occurred," Respondent "failed to rebut the General Counsel's prima facie case of discrimination[.]" *Gull, Inc.*, 279 NLRB 931, 931 n. 1

[45] There was some testimony about employees, including Lerma, throwing pens at each other in the warehouse. Vaivao testified that they were addressing this behavior specifically during this meeting. Tr. 237:20-239:16; 743:7-12. However, "pen throwing" was never mentioned during this meeting by either Engdahl or Vaivao. See GC Ex. 13(a) and 13(b). Further, throwing pens seems a lot like horseplay, which Vaivao said happens at the warehouse. Tr. 930:19-23.

(1986). Rather, the evidence shows that Respondent's reasons for reprimanding Lerma were merely pretext, thus precluding a finding that it would have disciplined Lerma in absence of his protected activity. *Case Farms of N. Carolina, Inc.*, 353 NLRB 257, 259 (2008).

Accordingly, the General Counsel respectfully requests that the ALJ find that Respondent violated Section 8(a)(3) of the Act by verbally disciplining Lerma because he engaged in union activity and to discourage others from doing so.

D. In Addition to Engaging in Unfair Labor Practices Aimed at Extinguishing the Union Organizing Campaign, Respondent Has Maintained Countless Work Rules in Its Associate Handbook That Violate Section 8(a)(1) of the Act

1. The Legal Standard

The Board has held that an employer's maintenance of a work rule that "would reasonably tend to chill employees in the exercise of their Section 7 rights," violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB at 825. In particular, a rule is unlawful if "employees would reasonably construe [its] language to prohibit Section 7 activity."[46] *Lutheran Heritage*, 343 NLRB at 647. In applying this standard, the Board "give[s] the work rule a reasonable reading and refrain[s] from reading particular phrases in isolation." *Albertson's, Inc.*, 351 NLRB 254, 259 (2007). Any ambiguity in a rule is construed against the employer that promulgated it. *Flex Frac*, 358 NLRB at slip op. at 2; *Lafayette Park Hotel*, 326 NLRB at 828.

The Board has explained that "[t]his principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer—instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it." *Flex Frac*, 358 NLRB No. 127, slip op. at 2. Thus,

[46] Rules that explicitly restrict Section 7 activity and rules promulgated in response to, or applied to restrict, Section 7 activity are also unlawful. *Lutheran Heritage*, 343 NLRB at 646-47 & n.5

the Board has held that employees "should not have to decide at their own peril" whether to engage in a protected activity that may be implicated by an ambiguously worded work rule. *Id.*; *cf. NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969) (assessment of whether employer statements violate Section 8(a)(1) "must take into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear").

2. Analysis

a. Respondent's Rule Concerning Protecting the Company's Confidential Information Is Overly Broad

Respondent maintains a rule entitled, "Protecting the Company's Confidential Information," that provides, in relevant part:

> The Company's confidential information is a valuable asset and includes: information, knowledge, or data concerning . . . associates, . . Company manuals and policies, . . . calendars and/or day-timers that contain customer contact and other customer information, [and] compensation schedules[.]
>
> * * *
>
> All confidential information must be used for Company business purposes only. Every associate, agent, and contractor must safeguard it. **THIS RESPONSIBILITY INCLUDES NOT DISCLOSING THE COMPANY CONFIDENTIAL INFORMATION, INCLUDING INFORMATION REGARDING THE COMPANY'S PRODUCTS OR BUSINESS, OVER THE INTERNET, INCLUDING THROUGH SOCIAL MEDIA.**

GC Ex. 3 at 8-9. The rule is overly broad in several respects.

It is well-established that employees have the right to communicate with each other and with non-employees about their terms and conditions of employment. *Beth Israel Hosp. v. NLRB*, 437 U.S. 483, 491 (1978); *Flex Frac*, 358 NLRB No. 127 at slip op. at 1. Thus, an

employer's maintenance of work rules that employees would reasonably understand to restrict their ability to engage in such communications violates Section 8(a)(1). *Cintas Corp. v. NLRB*, 482 F.3d 463, 468-69 (D.C. Cir. 2007) (rule prohibiting disclosure of "any information concerning" employees unlawful); *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip op. at 2-3 (July 31, 2014) (rule requiring employees to "[k]eep customer and employee information secure" unlawful); *Flex Frac*, 358 NLRB No. 127, slip op. at 1-3 (rule prohibiting disclosure of "personnel information and documents" to persons "outside the organization" unlawful); *Trinity Protection Services*, 357 NLRB No. 117, slip op. at 2 (2011); *Hyundai America Shipping Agency Inc.*, 357 NLRB No. 80, slip op. at 12, 13 (2011) (rule prohibiting "[a]ny unauthorized disclosure from an employee's personnel file"); *Automatic Screw Prods. Co.*, 306 NLRB 1072, 1072 (1992) (unlawful rule barred employee discussion of salary information). A rule restricting disclosure of personnel or employee information will only be found lawful if it is clear based on the language of the rule and the rule's entire context that the rule only restricts disclosure of information not implicating Section 7 concerns, such as intellectual property, trade secrets, hotel guest information, and patient medical information. *Aroostook County Reg. Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 211-13 (D.C. Cir. 1996); *Mediaone of Greater Florida, Inc.*, 340 NLRB 227, 278-79 (2003); *Lafayette Park*, 326 NLRB at 826).

Respondent's rule concerning protecting confidential information, first, defines "confidential information" as including information about "associates, . . Company manuals and policies, . . . calendars and/or day-timers that contain customer contact and other customer information, [and] compensation schedules." Employees would, thus, understand the rule to mean that information about Respondent's employees and their terms and conditions of

employment is confidential. The rule then goes on to prohibit use of such information for purposes other than business purposes and to prohibit disclosure of such information over the internet, including through social media. Employees would reasonably understand this prohibition to bar communications with their co-workers, labor organizations, other third parties, and the public about Respondent's employees and their terms and conditions of employment. The broad wording of the prohibition would reasonably be understood to encompass all communications, including communications over the internet and through social media. The General Counsel therefore respectfully requests that the ALJ find that Respondent's maintenance of the rule is unlawful.

b. Respondent's Rule Concerning Its Non-Disclosure/Assignment Agreement Is Overly Broad

Respondent maintains a rule entitled, "Non-Disclosure/Assignment Agreement," that provides, in relevant part:

> When you joined the Company, you signed an agreement to protect and hold confidential the Company's proprietary information. This agreement remains in effect for as long as you work for the Company and after you leave the Company. Under this agreement you may not disclose the Company's confidential information to anyone or use it to benefit anyone other than the Company without the prior written consent of an authorized Company officer.

GC Ex. 3 at 9. Because Respondent's definition of "confidential information" would reasonably be understood by employees to encompass information about Respondent's employees and their terms and conditions of employment, this rule would reasonably be understood by employees to prohibit disclosure of such information to benefit anyone other than Respondent without Respondent's written consent. Thus, the rule infringes on employees' Section 7 right to communicate about their terms and conditions of employment. *See Flex Frac*, 358 NLRB No. 127, slip op. at 1-3; *Costco Wholesale Corp.*, 358 NLRB No. 106 (2012); *Hyundai America*

Shipping Agency Inc., 357 NLRB No. 80 at slip op. at 21; *Brunswick Corp.*, 282 NLRB 794, 795 (1987). The General Counsel therefore respectfully requests that the ALJ find that Respondent's maintenance of the rule is unlawful.

c. Respondent's Rule Concerning Requests by Regulatory Authorities Is Overly Broad

Respondent maintains a rule entitled, "Non-Disclosure/Assignment Agreement," that provides:

> All government requests for information, documents or investigative interviews must be referred to the Company's Human Resources Department.

GC Ex. 3 at 11. Because this rule would reasonably be understood by employees to require them to refer requests by the Board for documents or investigative interviews to Respondent, it unlawfully interferes with the rights of employees to participate in Board investigations. *Hyundai America Shipping Agency Inc.*, 357 NLRB No. 80 at slip op. at 12-13. Further, it would reasonably be understood by employees to require them to refer requests by other government agencies investigated concerted employee complaints about their terms and conditions of employment to Respondent, thus also interfering with their Section 7 rights in that regard. The General Counsel therefore respectfully requests that the ALJ find that Respondent's maintenance of this rule is unlawful.

d. Respondent's Rule Concerning Company Spokespeople Is Overly Broad

Respondent maintains a rule entitled, "Company Spokespeople" that provides:

> The Company has an established Spokesperson who handles all requests for information from the Media. Ms. Sandra Kelly at the Dairy is the person who has been designated to provide overall Company information or to respond to any public events or issues for which we might receive press calls or inquiries. If you believe that an event or situation may result in the press seeking additional

> information, please contact Ms. Kelly at the Dairy to advise her of the nature of the situation so that she may be prepared for any calls.

GC Ex. 3 at 11. That rule unlawfully interferes with the rights of employees to concertedly publicize matters related to their terms and conditions of employment. It is well settled that employees have the right to publicize matters related to their terms and conditions of employment, including through the press, and that rules interfering with the exercise of that right are unlawful. *See Sheraton Anchorage*, 359 NLRB No. 95, slip op. at 3 fn. 8 (2013); *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004). Further, as noted above, employers violate the Act when they ask their employees to ascertain and disclose the membership, activities, and sympathies of other employees. *See, e.g., Bloomington-Normal Seating Co.*, 339 NLRB at 193; *Arcata Graphics/Fairfield, Inc.*, 304 NLRB 541; *Sunbeam Corp.*, 284 NLRB at 997. By requiring employees to report events or situations that may result in the press seeking additional information, Respondent's rule would reasonably be understood to require employees to report plans by employees to engage in activities to publicize matters related to their terms and conditions of employment or related to a union organizing campaign. The knowledge that failing to report such plans to Respondent is a violation of Respondent's rules, and the knowledge that other employees may report plans to engage in protected activities, would deter employees from participating in such activities, thus interfering with the exercise of their Section 7 rights. The General Counsel therefore respectfully requests that the ALJ find Respondent's maintenance of the rule to be unlawful.

e. Respondent's Rule Regarding Electronic and Telephonic Communications Is Overly Broad

Respondent maintains a rule entitled, "Electronic and Telephonic Communications," that provides, in relevant part:

> All electronic and telephonic communications systems and all communications and information transmitted by, received from, or stored in these systems are the property of Shamrock and as such are to be used solely for job-related purposes. The use of any software and business equipment, including, but not limited to, facsimiles, computers, the Company's E-mail system, the Internet, and copy machines for private purposes is strictly prohibited.
> * * *
> Moreover, improper use of the E-mail system (e.g., spreading offensive jokes or remarks), including the Internet, will not be tolerated.

GC Ex. 3 at 59. That rule violates Section 8(a)(1) of the Act, both because it interferes with the right of employees who have access to Respondent's electronic and telephonic communications for job-related purposes to use those resources to engage in protected activities during non-working time, and because the ambiguous restriction on "improper use" of Respondent's email system is overly broad.

The Board has held that "employees who have rightful access to their employer's email system in the course of their work" have a presumptive "right to use the email system to engage in Section 7-protected communications on nonworking time." *Purple Communications*, 361 NLRB No. 126, slip op. at 14 (2014). An employer can only overcome the presumption that employees have such a right by establishing "special circumstances necessary to maintain production or discipline." *Id.* The Board has explained that, "[b]ecause limitations on employee communications should be no more restrictive than necessary to protect the employer's interests, we anticipate that it will be a rare case where special circumstances justify a total ban on nonwork email use by employees." *Id.* The Board has acknowledged that employers may, however, apply uniform and consistently enforced controls over their e-mail systems, such as restrictions on the size of attachments or transmission of video files, if such controls are necessary to ensure functionality of the system. *Id.* at 14-15.

The Board has also found that employer rules using terms so broad that employees would understand them to restrict their right to engage in protected activities are unlawful. *See The Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1 (rule prohibiting behavior that publicly embarrasses the employer unlawful); *Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014) (rule prohibiting "inappropriate" discussions on social media overly broad); *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 3 (rule prohibiting discourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public" unlawful); *2 Sisters Food Group, Inc.*, 357 NLRB No. 168, slip op. at 3 (2011); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 295 (1999) (rule prohibiting use of "loud, abusive, or foul language" unlawful); *Advance Transp. Co.*, 310 NLRB 920, 925 (1993) (rule barring "harassment, intimidation, distraction or disruption of another employee" unlawful).

Thus, the first paragraph of Respondent's rule is unlawful because it broadly restricts employees' use of electronic and telephonic communications system for purposes that are not job-related, thus restricting the right of employees who have access to those systems to use them to engage in protected activities during non-working time. The second quoted paragraph of Respondent's rule further includes an overly broad restriction on "improper use" of Respondent's e-mail system, including the internet, such as "offensive" jokes or remarks. Because of the broad, ambiguous nature of the terms "improper" and "offensive," employees would reasonably understand this rule to prevent their use of Respondent's e-mail system and the internet to engage in Section 7 protected communications that Respondent considered "improper" or "offensive." The General Counsel therefore respectfully requests that the ALJ find that Respondent's maintenance of the rule, including the threat that violation of the rule "will not be tolerated" is unlawful.

f. Respondent's Rule Concerning Monitoring Internet Use Creates the Impression of Surveillance of Employees' Protected Activities

Respondent maintains a rule entitled, "Monitoring Use," that provides:

> Shamrock reserves the right to use software and blog-search tools to monitor comments or discussions about company representatives, customers, vendors, other associates, the company and its business and products, or competitors that associates or non-associates post anywhere on the Internet, including in blogs and other types of openly accessible personal journals, diaries, and personal and business discussion forums.

GC Ex. 3 at 59. This rule is unlawful because it creates the impression that Respondent will engage in surveillance of employees' protected activities on the internet. In *Purple Communications*, the Board stated that its decision did not prevent employers from "continuing, as many already do, to monitor their computers and email systems for legitimate management reasons, such as ensuring productivity and preventing email use for purposes of harassment or other activities that could give rise to employer liability," and it also stated that employers are not ordinarily prevented from notifying employees that they monitor computer and email use for legitimate management reasons, such that employees had no expectation of privacy in their use of the employers' email systems. 361 NLRB No. 127, slip op. at 15-16. However, the Board also stated that allegations of surveillance of protected activities would continue to be assessed using the same standards applied "in the bricks-and-mortar world," explaining:

> Board law establishes that "those who choose openly to engage in union activities at or near the employer's premises cannot be heard to complain when management observes them. The Board has long held that management officials may observe public union activity without violating the Act so long as those officials do not 'do something out of the ordinary.'" An employer's monitoring of electronic communications on its email system will similarly be lawful so long as the employer does nothing out of the ordinary, such as increasing its monitoring during an organizational campaign or focusing its monitoring efforts on protected conduct or union activists.

Id. at 15. Respondent's rule concerning monitoring internet usage goes beyond the permissible bounds for monitoring delineated in *Purple Communications* because it applies not just to employee use of its computer and email system, but to all internet communications mentioning Respondent or its employees. Employees reading the rule would therefore reasonably understand it to mean that Respondent is reserving the right to monitor their protected comments and discussions on their personal social media accounts, as well as on other websites, such as labor organizations' websites, websites of news organizations, and other online forums. The rule therefore interferes with employees' exercise of their rights under Section 7 of the Act, and the General Counsel respectfully requests that the ALJ find that Respondent's maintenance of the rule is unlawful.

g. Respondent's Rule Concerning Email Is Overly Broad

> Respondent maintains a rule entitled, "E-Mail," that provides:
>
> Associates are prohibited from using any Instant Messaging applications except those provided specially by Shamrock for Associate's business use.

GC Ex. 3 at 60. This rule unlawfully restricts the right to engage in protected activities using Instant Messaging applications. Just as employees have the right to communicate concertedly with each other, with labor organizations, with other third parties, and with the public in-person about their terms and conditions of employment or union organizing campaigns, they also have the right to communicate about those subjects electronically. *Triple Play Sports Bar and Grille*, 361 NLRB No. 31, slip op. at 1 (2014), *enfd*. --- Fed. Appx. --- (2d Cir. Oct. 21, 2015). Thus, Respondent's complete ban on use of intent messaging applications other than those provided by Respondent for employees' business use is overly broad. Although the Board, in *Purple Communications*, stated that it was not reaching the issue of whether employees could use their

employers' computer systems to engage in Section 7 communications using instant messaging applications, the Board said the issue may ultimately be subject to the same analysis as use of employers' e-mail systems to engage in protected activities during non-working time. 361 NLRB No. 127 at 14 n. 70. Under such an analysis, Respondent has made no showing of any special circumstances justifying a ban on use of instant messaging applications on its computer system. Moreover, Respondent's rule, on its face, does not just apply to use of instant messaging applications on Respondent's computer system and devices, and instead applies to all use of instant messaging applications, on any computer system or device. Thus, employees would reasonably understand the rule to prohibit even their use of instant messaging applications on their own personal computer systems or devices, or on the systems or devices of other individuals or organizations, to engage in protected communications.

h. Respondent's Rule Concerning Use of the World Wide Web Is Overly Broad

Respondent maintains a rule entitled, "E-Mail," that provides, in relevant part:

> As a general rule, associates may not forward, distribute, or incorporate into another work, material retrieved from a Web site or other external system.
>
> * * *
>
> 2. No Downloading of Non-Business Related Data: The Company allows the download of files from the Internet. However, downloading files should be limited to those that relate directly to Shamrock business.
>
> * * *
>
> 4. No Participation in Web-Based Surveys without Authorization: When using the Internet, the user implicitly involves Shamrock in his/her expression. Therefore, users should not participate in Web or E-mail based surveys or interviews without authorization.

GC Ex. 3 at 60. This rule interferes with employees' rights to engage in Section 7 protected communications on the internet in several respects.

Preliminarily, it is noted that Respondent did not include any language in the rule indicating that it was intended to apply only to use of Respondent's computer system and equipment, such that the rule would reasonably be understood by employees to apply to their use of the internet through their own computer systems or devices or those of other employees or organizations. The rule prohibits employees from forwarding, distributing, or incorporating into another work material retrieved from a website or other external system and also from downloading non-business related data. Thus, the rule would reasonably be read by employees to prohibit them from forwarding or distributing information about a labor organization or about Respondent, its employees, and their terms and conditions of employment, to other employees, if they obtained those materials on the internet or though another "external system," which could include, for example, union literature and authorization cards, news articles about Respondent or its employees, and other employees' social media postings about Respondent. Although Respondent may assert that the rule is intended to avoid liability for copyright or trademark infringement, the rule is not tailored to address those concerns as, on its face, it broadly bars all distribution of materials received "from a website or other external system." The rule also requires employees to obtain Respondent's authorization to participate in web-based or email surveys, which naturally would encompass surveys generated by labor organizations to solicit information about employees' concerns or to assess their interest in organizing.

Further, even if it were found that, in context, the rule was only intended to apply to use of Respondent's computer system and devices, Respondent has made no showing of legitimate business interests or other circumstances justifying its limitation on use of the internet through its

computer system and devices. Thus, Respondent has made no showing that the restriction is necessary to maintain productivity or avoid overburdening its computer system and devices. Thus, applying the same rationale applied by the Board in *Purple Communications*, the restriction, which constrains employees' ability to use the internet to engage in protected concerted activities during non-working time using Respondent's computer system and devices, is overly broad. 360 NLRB No. 127, slip op. at 14.

Respondent's rule is overly broad, and the General Counsel therefore respectfully requests that the ALJ find that Respondent's maintenance of the rule was unlawful.

i. Respondent's Rule Concerning Blogging Is Overly Broad

Respondent maintains a rule entitled, "Blogging," that provides, in relevant part:

> The following rules and guidelines apply to blogging, whether blogging is done for Shamrock on company time, on a personal Web site during non-work time, or outside the workplace. The rules and guidelines apply to all associates.
>
> (A) Shamrock discourages associates from discussing publicly any work-related matters, whether confidential or not, outside company-authorized communications. Nonofficial company communications include Internet chat rooms, associates' personal blogs and similar forms of online journals or diaries, personal newsletters on the Internet, and blogs on Web sites not affiliated with, sponsored, or maintained by Shamrock.
>
> (B) Associates have a duty to protect associates' home addresses . . . and other personal information and . . . financial information . . . and nonpublic company information that associates can access.
>
> (C) Associates cannot use blogs to harass, threaten, libel, or slander, malign, defame or disparage, or discriminate against co-workers, managers, customers, clients, vendors or suppliers, and organizations associated or doing business with Shamrock, or members of the public, including Web site visitors who post comments about blog contents.
>
> (D) Associates cannot use Shamrock's logo or trademarks or the name, logo, or trademarks of any business partner, supplier,

> vendor, affiliate, or subsidiary on any personal blogs or other online sites unless their use is sponsored or otherwise sanctions, approved, or maintained by Shamrock.
>
> * * *
>
> Associates cannot post on personal blogs Shamrock's copyrighted information or company-issued documents bearing Shamrock's name, trademark, or logo.
>
> (E) Associates cannot post on personal blogs photographs of company events, other associates or company representatives engage in Shamrock's business, or company products, unless associates have received Shamrock's explicit permission.
>
> (F) Shamrock discourages associates from linking to Shamrock's external or internal Web site from personal blogs.

GC Ex. 3 at 61-62. Respondent's rule concerning blogging interferes with employees' Section 7 rights in many respects. First, it explicitly applies to employees' blogging on personal websites, during non-work time, or outside the workplace. The rule then states that Respondent "discourages associates from discussing publicly any work-related matters, whether confidential or not, outside company-authorized communications." This very broad restriction would certainly be understood by employees to encompass Section 7 protected communications about Respondent, such as criticisms of its labor policies and of the terms and conditions of employment it sets for its employees and also communications about a union organizing campaign among its employees. This rule certainly interferes with employees' right to engage in Section 7 protected communications electronically. *See Triple Play Sports Bar and Grille*, 361 NLRB No. 31, slip op. at 1.

Next, the rule burdens employees with a "duty to protect associates' home addresses . . . and other personal information and . . . financial information . . . and nonpublic company

information that associates can access." As noted above, employees have the right to communicate with each other and with non-employees about their terms and conditions of employment, such that employers' maintenance of work rules that employees would reasonably understand to restrict their ability to engage in such communications violates Section 8(a)(1). *Cintas Corp. v. NLRB*, 482 F.3d at 468-469; *Fresh & Easy Neighborhood Market*, 361 NLRB No. 8, slip op. at 2-3; *Flex Frac*, 358 NLRB No. 127, slip op. at 1-3; *Hyundai America Shipping Agency Inc.*, 357 NLRB No. 80, slip op. at 12, 13; *Automatic Screw Prods. Co.*, 306 NLRB at 1072. Employees' right to communicate with others about their terms and conditions of employment encompasses the right to disclose coworkers' names and contact information to a labor organization in furtherance of an organizing effort or to other employees in aid of protected concerted activities. *See Ridgely Mfg. Co.*, 207 NLRB 193, 196-97 (1972) (employee right to obtain names of coworkers from timecards), *enfd.*, 510 F.2d 185 (D.C. Cir. 1975). Respondent's restriction on sharing employees' The terms "personal information," "financial information," and "non-public company information" are so broad and ambiguous that Respondent would reasonably understand the rule to restrict their ability to communicate about their terms and conditions of employment and about union organizing campaigns on blogs. Further, the restriction on disclosure of employees home addresses squarely interferes with the right of employees to share such information as part of a union organizing campaign or a campaign of protected concerted activities.

The rule next bars employees from "us[ing] blogs to harass, threaten, libel, or slander, malign, defame or disparage, or discriminate against co-workers, managers, customers, clients, vendors or suppliers, and organizations associated or doing business with Shamrock, or members of the public, including Web site visitors who post comments about blog contents." As noted

above, the Board has found that employer rules using terms so broad that employees would understand them to restrict their right to engage in protected activities are unlawful. *See The Sheraton Anchorage*, 362 NLRB No. 123, slip op. at 1; *Triple Play Sports Bar and Grille*, 361 NLRB No. 31; *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 3; *2 Sisters Food Group, Inc.*, 357 NLRB No. 168, slip op. at 3; *Flamingo Hilton-Laughlin*, 330 NLRB at 295; *Advance Transp. Co.*, 310 NLRB at 925. Respondent's use of the broad , ambiguous terms "harass, threaten, libel, or slander, malign, defame or disparage, or discriminate against" would reasonably be understood by employees to encompass Section 7 protected communications, such as solicitation of employees to engage in protected activities or support a union that the solicited employees find offensive or annoying, or heated debate among employees about a union organizing campaign or their terms and conditions of employment.

The rule also prohibits use of Respondent's logo or trademarks or the name, logo, or trademarks of any business partner, supplier, vendor, affiliate, or subsidiary without approval. It further prohibits posting of "copyrighted information or company-issued documents bearing Shamrock's name, trademark, or logo" and discourages linking Respondent's website from personal blogs. All of these restrictions would reasonably be understood by employees to restrict their ability to clearly identify their employer in Section 7 protected communications on their blogs. Thus, the rule interferes with the Section 7 right of employees to display logos as part of their Section 7 communications. *See UPMC*, 362 NLRB No. 191, slip op. at 2 n. 5 (2015); *Boch Honda*, 362 NLRB No. 83, slip op. at 2 (2015) (finding that employees would reasonably read rule prohibiting use of employer's logos to cover protected employee communications); *Pepsi Cola Bottling Co.*, 301 NLRB 1008, 1019-1020 (1991) (finding unlawful prohibition on wearing uniforms with logos while off duty, despite employer's assertion that the rule was "designed to

protect the reputations of [employer's] products' trademarks and logos"). The restriction on disclosure of company-issued documents bearing Respondent's name, trademark, or logo, would also reasonably be read by employees to restrict their ability to share Respondent's policies, such as its Associate Handbook, on their blogs, to the extent they have Respondent's name, trademark, or logo on them, and would restrict employees from exercising their Section 7 right to share their personnel records if those records have Respondent's name, trademark, or logo on them. *Hyundai America Shipping Agency, Inc.*, 357 NLRB No. 80, slip op. at 21. Finally, the restriction on linking Respondent's website, like the restriction on using Respondent's logo or trademark, interferes with employees' ability to use links to Respondent's website to effectively identify Respondent in their Section 7 protected communications, and Respondent has not offered any legitimate business justification for this restriction.

In sum, Respondent's blogging rule is overly broad, and the General Counsel respectfully requests that the ALJ find that Respondent's maintenance of the rule is unlawful.

j. Respondent's Guidelines to Prohibited Activities Are Overly Broad

Respondent maintains a rule entitled, "Guideline to Prohibited Activities," that provides, in relevant part:

> The following behaviors are examples of previously stated or additional actions to activities that are prohibited and considered improper use of the Internet, E-mail or voicemail systems provided by Shamrock. These examples are provided as guidelines only and are not all-inclusive:
>
> (A) Sending or posting confidential material, trade secrets, or proprietary information outside of the organization.
>
> (B) Refusing to cooperate with security investigations.

(C) Sending or posting chain letters, solicitations, or advertisements not related to business purposes or activities.

(D) Sending or posting messages that disparage another organization.

GC 3 at 62. That rule is overly broad in several respects. First, the rule prohibits employees from "sending or posting confidential material, trade secrets, or proprietary information outside the organization." Respondent gives no definition or examples of these terms, and, as noted above, it incorporates an overly broad definition of confidential information on pages 8 and 9 of its Associate Handbook.

Next, the rule prohibits employees from "[r]efusing to cooperate with security investigations," without clarifying that, under *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), employees have the right to refuse to cooperate in investigations related to unfair labor practices. Thus, for example, if an employee posted a disparaging remark about Respondent's managers on a blog or Facebook page, and Respondent wanted to interview employees as part of an investigation of that conduct, employees would reasonably understand employees to compel them to participate in the interview.

Third, the rule broadly prohibits "[s]ending or posting chain letters, solicitations, or advertisements not related to business purposes or activities." As explained above, the Board has held that "employees who have rightful access to their employer's email system in the course of their work" have a presumptive "right to use the email system to engage in Section 7-protected communications on nonworking time." *Purple Communications*, 361 NLRB No. 126, slip op. at 14. The rule's prohibition on use to the Employer's internet, email or voicemail systems would reasonably be understood by employees to bar them from forwarding emails related to their terms and conditions of employment to other employees and asking them to forward those emails

to other employees and to bar them from using email to solicit employees to support a union organizing campaign or a campaign of protected concerted activities.

Finally, the rule vaguely prohibits "[s]ending or posting messages that disparage another organization," a prohibition that would reasonably be read by employees to prohibit them from engaging in Section 7 communications critical of another organization, such as a benefit plan administrator or a labor organization.

In sum, Respondent's guidelines to prohibit activities are overly broad, and the General Counsel respectfully requests that the ALJ find that Respondent's maintenance of the guidelines and the threat of discipline for violating them are unlawful.

k. Respondent's Rules Concerning Reporting Violations Are Overly Broad and Solicit Employees to Report Protected Activities

Respondent maintains a rule entitled, "Reporting Violations," that provides, in relevant part:

> Shamrock requests and urges associates to use official company communications to report violations of Shamrock's blogging rules and guidelines, customers' or associates' complaints about blog content, or perceived misconduct or possible unlawful activity related to blogging, including security breaches, misappropriation or theft of proprietary business information, and trademark infringement.
>
> Associates can report actual or perceived violations to supervisors, other managers, or to Human Resources.
>
> ***
>
> As a condition of employment and continued employment, associates are required to sign an Electronic and Telephonic Communications Acknowledgement Form. Applicants are required to sign this form on acceptance of an employment offer by Shamrock.

GC Ex. 3 at 62-63. That rule is overly broad and unlawfully solicits employees to report employees' protected activities. As noted above, employers violate the Act when they ask their employees to ascertain and disclose the membership, activities, and sympathies of other employees. *See, e.g., Bloomington-Normal Seating Co.*, 339 NLRB at 193; *Arcata Graphics/Fairfield, Inc.*, 304 NLRB 541; *Sunbeam Corp.*, 284 NLRB at 997. Respondent's rule does exactly that, as it requires employees to report to Respondent violations of Respondent's overly blogging rules and guidelines, which, as noted above, would reasonably be read by employees to prohibit Section 7 activities. The rule further requires employees to report customers and employees' complaints about blog content, thus reasonably giving employees the impression that, if they make a protected comment that prompts a customer or employee complaint, their co-workers are required to report it to Respondent. In addition, the rule specifies that employees will have to sign an Electronic and Telephone Communications Form, presumably incorporating Respondent's various unlawful policies related to electronic and telephone communications as a condition of their employment. Thus, Respondent's rule concerning reporting violations is overly broad, and the General Counsel respectfully requests that the ALJ find that Respondent's maintenance of the rule is unlawful.

l. Respondent's Guidelines to Appropriate Conduct Are Overly Broad

Respondent maintains a rule entitled, "Guidelines to Appropriate Conduct," that provides, in relevant part:

> Listed below are some of the rules and regulations of Shamrock. This list should not be viewed as all-inclusive. It is intended only to illustrate the types of behavior and conduct that Shamrock considers inappropriate and grounds for disciplinary action up to and including termination of employment without prior warning, at the sole discretion of the company, including, but not limited to, the following:

(A) Theft and/or deliberate damage or destruction of property not belonging to the associate, including the misuse or unauthorized use of any products, property, tools, equipment of any person or the unauthorized use of any company-owned equipment.

(B) Any act that interferes with another associate's right to be free from harassment or prevents an associate's enjoyment of work . . . or conduct that creates a disturbance in the workplace.

GC Ex. 3 at 63-64. That rule is overly broad in two respects.

First, the prohibition on "misuse or unauthorized use of any products, property, tools, equipment of any person or the unauthorized use of any company-owned equipment" is overly broad because employees would reasonably understand it to encompass their use of Respondent's email system or their engaging in conduct that Respondent considered "misuse" of that system, although, as noted above, the Board has held that "employees who have rightful access to their employer's email system in the course of their work" have a presumptive "right to use the email system to engage in Section 7-protected communications on nonworking time." *Purple Communications*, 361 NLRB No. 126, slip op. at 14.

Second, the provision prohibiting "[a]ny act that interferes with another associate's right to be free from harassment or prevents an associate's enjoyment of work . . . or conduct that creates a disturbance in the workplace" would also be reasonably read by employees to prohibit Section 7 activities. The rule, by using broad terms such as "harassment," "prevents an associate's enjoyment work," and "conduct that creates a disturbance in the workplace" would reasonably be understood by employees to bar employees from engaging in protected activities that other employees subjectively consider harassing or annoying. In *W. F. Hall Co.*, 250 NLRB 803, 804 (1980), quoting *Colony Printing & Labeling, Inc.*, 249 NLRB 223, 225 (1980), *enfd.* 651 F.2d 502 (7th Cir.1981), the Board explained that "…the Act allows employees to engage in

persistent union solicitation even when it annoys or disturb s the employees who are being solicited." Thus, Respondent's rule, which would reasonably be read to prohibit such spirited and persistent protected activities, interferes with employees' Section 7 rights.

The General Counsel respectfully requests that the ALJ find Respondent's guidelines to appropriate conduct and the threat of discipline for violating those guidelines to be unlawful.

m. Respondent's Solicitation and Distribution Rules Are Overly Broad

Respondent maintains a rule entitled, "No Solicitation, No Distribution," which provides in relevant part:

> […] The conducting of non-company business related activities is prohibited during the working time by either the associate doing the soliciting or the associate being solicited or at any time in customer or public areas. Associates may not solicit other associates under any circumstances for any non-company related activities.
>
> The distribution of non-company literature, such as leaflets, letters or other written materials by an associate is not permitted . . . any time in working areas or in customer and public areas.
>
> ***
>
> If you would like to post any Shamrock business-related materials, please see your Department Manager, the General/Branch Manager or the Human Resources Representative. Only these individuals are authorized to approve and post information on Shamrock bulletin boards.

GC Ex. 3 at 65. That rule is overly broad in several respects. It is well settled that employees, generally, have the right to solicit others during non-working time and the right to distribute literature on an employer's premises, subject only to restrictions that it be done on non-working time and in non-working areas of the employer's facility. *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615 (1962) (rules prohibiting *distribution* of literature are presumed valid unless they extend to activities during non-working time and in non-working area; the right of employees to

solicit on plant premises must be afforded subject only to the restriction that it be on nonworking time). An employer may not deny off-duty employees access to non-working areas of its property, absent a legitimate business justification. *Sodexo America LLC*, 358 NLRB No. 79, slip op. at 1-2 (2012)*; Tri-County Med. Ctr.*, 222 NLRB 1089, 1089 (1976).

Here, Respondent's rule prohibits employees from soliciting or engaging in "non-company business related activities" during working time. The ambiguity in this rule is evidenced by the phase "non-company business related activities." The inclusion of this phrase broadens the scope of the rule and runs afoul of Section 8(a)(1) because it would reasonably be read to prohibit employees from discussing their working conditions or discussing the state of an organizing campaign during working time, even though there is no restriction on other types of discussions at the facility. Further, the sentence directly aimed at soliciting other associates is not specifically limited to working time and extends to customer and public areas. Again, this is overly broad as the Board has ruled that similarly worded rules would be read to prohibit off-duty solicitation in public areas. *See Flamingo Hilton-Laughlin*, 330 NLRB 287, 288 (1999). The paragraph prohibiting distribution in "public areas" is likewise overly broad. See id.

Additionally, the last paragraph of the rule stated above requires that employees seek approval before posting any information at its facility. The rule is not limited to working areas. Any rule that requires employees to secure permission from their employer prior to engaging in protected activity on their free time and in non-working areas is unlawful. *Brunswick Corp.*, 282 NLRB 794, 795 (1987).

Respondent's rules governing solicitation and distribution are therefore overly broad, and the General Counsel respectfully requests that the ALJ find that Respondent's maintenance of these rules is unlawful.

n. Respondent's Posted Rule Concerning Cell Phone Use Is Overly Broad

In addition to maintaining the above-described rules in its employee handbook, Respondent also posted a rule concerning cell phone use at its facility. Tr. 750:14-752:8; 783:10-21. The rule states:

> In an effort to improve the workplace safety environment, ensure the safety of our associates and to maintain compliance with State, Federal and regulatory agencies, the use of all musical devices to include, but not limited to cell phones and head/ear phone use within the warehouse is being discontinued effective January 4, 2015.

GC Ex. 27(a) and (b). Respondent's posted cell phone use rule is overly broad. Employees have a right to document their working conditions for various reasons, including to aid federal government investigations, *Sullivan, Long, & Hagerty*, 303 NLRB 1007, 1013 (1999), and to publicize inconsistent application of employer rules. *White Oak Manor*, 353 NLRB 795, 795 fn. 2, 798-99 (2009). For that reason, the Board has held that rules broadly prohibiting the use of such recording devices violate the Act, unless such rules are tailored to a particularized interest. *Caesars Entertainment*, 362 NLRB No. 190, slip op. at 4 (2015).

Here, Respondent's rule is a sweeping prohibition on the use of cell phones, the most commonly used recording device in the modern age. Although Respondent cites to workplace safety as a concern for employees listening to music devices while working, Respondent's rule is not strictly limited to using such devices for the purpose of listening to music. Rather, employees would interpret the rule to ban the use of cell phones for any purpose whatsoever, including recording their working conditions for any number of reasons protected under the Act. Moreover, the rule prohibits all cell phone use at any time in Respondent's warehouse, and, therefore would reasonably be understood by employees to bar the use of cell phones to engage in protected activities, such as talking to coworkers about terms and conditions of employment or

communicating with a labor organization, during non-working time in non-working areas of Respondent's warehouse. Therefore, Respondent's rule is overly broad, and the General Counsel respectfully requests that the ALJ find that Respondent's promulgation and maintenance of this rule is unlawful.

V. Conclusion

Based on the foregoing, the General Counsel requests that the Administrative Law Judge find that Respondent violated Section 8(a)(1) and (3) of the Act as alleged. The General Counsel requests that the Administrative Law Judge order that Respondent cease and desist from such conduct, and order other relief as may be necessary and appropriate to effectuate the policies and purposes of the Act, including to post an appropriate notice, a suggested copy of which is attached, and have the notice read to employees by a representative of Respondent or an official Board agent.

Dated at Phoenix, Arizona, this 25th day of November, 2015.

Respectfully submitted,

/s/ Sara S. Demirok

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Proposed Notice to Employees
(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

WE WILL NOT do anything to prevent you from exercising the above rights.

YOU HAVE THE RIGHT to engage in activities with other employees regarding your wages, hours, and working conditions. **WE WILL NOT** do anything to interfere with your exercise of these rights.

WE WILL NOT question you about your union membership, support or other union activity.

WE WILL NOT watch you or make it appear that we are watching you to find out about your union or other protected activities, including by going through your personal belongings in search of union cards or other union materials.

WE WILL NOT threaten you with loss of benefits for selecting the Union as your bargaining representative by telling you that the slate is wiped clean on wages, benefits, and other working conditions once collective bargaining begins.

WE WILL NOT grant wage increases, or other benefits and improved working conditions, if you refrain from supporting the Union.

WE WILL NOT guarantee that there will be no layoffs if you refrain from supporting the Union.

WE WILL NOT solicit complaints and grievances from you and promise to remedy them in order to restrain your support for the Union.

WE WILL NOT ask you to disclose yours or other employees' union support or activity.

WE WILL NOT threaten you if you engage in Union and other protected activities.

WE WILL NOT selectively and disparately enforce our no-solicitation and no-distribution rules based on your union activity, such as passing out flyers in support of the Union.

WE WILL NOT tell you that it would be futile to select the Union as your bargaining representative.

WE WILL NOT implement or maintain work rules in response to your union activity, such as prohibiting heckling, insults, or potential slow-downs by employees who support the union.

WE WILL NOT threaten you with legal prosecution for violating rules we implemented or maintain in response to your union activity.

WE WILL NOT fire or issue you discipline if your raise concerns regarding your working conditions, including your health benefits, or because of your Union support or membership.

WE WILL NOT maintain or enforce the following rules in the Employee Handbook which tend to interfere with, restrain, and coerce you in your exercise of your rights under the National Labor Relations Act:

(1) Protecting the Company's Confidential Information

The Company's confidential information is a valuable asset and includes: information, knowledge, or data concerning . . . associates, . . . Company manuals and policies, . . . calendars and/or day-timers that contain customer contact and other customer information, [and] compensation schedules[.]

* * *

All confidential information must be used for Company business purposes only. Every associate, agent, and contractor must safeguard it. **THIS RESPONSIBILITY INCLUDES NOT DISCLOSING THE COMPANY CONFIDENTIAL INFORMATION, INCLUDING INFORMATION REGARDING THE COMPANY'S PRODUCTS OR BUSINESS, OVER THE INTERNET, INCLUDING THROUGH SOCIAL MEDIA.**

(2) Non-Disclosure/ Assignment Agreement.

When you joined the Company, you signed an agreement to protect and hold confidential the Company's proprietary information. This agreement remains in effect for as long as you work for the Company and after you leave the Company. Under this agreement you may not disclose the Company's confidential information to anyone or use it to benefit anyone other than the Company without the prior written consent of an authorized Company officer.

(3) Requests by Regulatory Authorities.

All government requests for information, documents or investigative interviews must be referred to the Company's Human Resources Department.

(4) Company Spokespeople.

The Company has an established Spokesperson who handles all requests for information from the Media. Ms. Sandra Kelly at the Dairy is the person who has been designated to provide overall Company information or to respond to any

public events or issues for which we might receive press calls or inquiries. If you believe that an event or situation may result in the press seeking additional information, please contact Ms. Kelly at the Dairy to advise her of the nature of the situation so that she may be prepared for any calls.

(5) Electronic and Telephonic Communications

All electronic and telephonic communications systems and all communications and information transmitted by, received from, or stored in these systems are the property of Shamrock and as such are to be used solely for job-related purposes. The use of any software and business equipment, including, but not limited to, facsimiles, computers, the Company's E-mail system, the Internet, and copy machines for private purposes is strictly prohibited.

* * *

Moreover, improper use of the E-mail system (e.g., spreading offensive jokes or remarks), including the Internet, will not be tolerated.

(6) *Monitoring Use*

Shamrock reserves the right to use software and blog-search tools to monitor comments or discussions about company representatives, customers, vendors, other associates, the company and its business and products, or competitors that associates or non-associates post anywhere on the Internet, including in blogs and other types of openly accessible personal journals, diaries, and personal and business discussion forums.

(7) *E-Mail*

Associates are prohibited from using any Instant Messaging applications except those provided specially by Shamrock for Associate's business use.

(8) *World Wide Web*

As a general rule, associates may not forward, distribute, or incorporate into another work, material retrieved from a Web site or other external system.

* * *

No Downloading of Non-Business Related Data: The Company allows the download of files from the Internet. However, downloading files should be limited to those that relate directly to Shamrock business.

* * *

No Participation in Web-Based Surveys without Authorization: When using the Internet, the user implicitly involves Shamrock in his/her expression. Therefore,

users should not participate in Web or E-mail based surveys or interviews without authorization. (page 60)

(9) ***Blogging***

The following rules and guidelines apply to blogging, whether blogging is done for Shamrock on company time, on a personal Web site during non-work time, or outside the workplace. The rules and guidelines apply to all associates.

(A) Shamrock discourages associates from discussing publicly any work-related matters, whether confidential or not, outside company-authorized communications. Nonofficial company communications include Internet chat rooms, associates' personal blogs and similar forms of online journals or diaries, personal newsletters on the Internet, and blogs on Web sites not affiliated with, sponsored, or maintained by Shamrock.

(B) Associates have a duty to protect associates' home addresses . . . and other personal information and . . . financial information . . . and nonpublic company information that associates can access.

(C) Associates cannot use blogs to harass, threaten, libel, or slander, malign, defame or disparage, or discriminate against co-workers, managers, customers, clients, vendors or suppliers, and organizations associated or doing business with Shamrock, or members of the public, including Web site visitors who post comments about blog contents.

(D) Associates cannot use Shamrock's logo or trademarks or the name, logo, or trademarks of any business partner, supplier, vendor, affiliate, or subsidiary on any personal blogs or other online sites unless their use is sponsored or otherwise sanctions, approved, or maintained by Shamrock.

* * *

Associates cannot post on personal blogs Shamrock's copyrighted information or company-issued documents bearing Shamrock's name, trademark, or logo.

(E) Associates cannot post on personal blogs photographs of company events, other associates or company representatives engage in Shamrock's business, or company products, unless associates have received Shamrock's explicit permission.

(F) Shamrock discourages associates from linking to Shamrock's external or internal Web site from personal blogs.

(10) ***Guideline to Prohibited Activities***

The following behaviors are examples of previously stated or additional actions to activities that are prohibited and considered improper use of the Internet, E-mail or voicemail systems provided by Shamrock. These examples are provided as guidelines only and are not all-inclusive:

(A) Sending or posting confidential material, trade secrets, or proprietary information outside of the organization.

(B) Refusing to cooperate with security investigations.

(C) Sending or posting chain letters, solicitations, or advertisements not related to business purposes or activities.

(D) Sending or posting messages that disparage another organization.

(11) ***Reporting Violations***

Shamrock requests and urges associates to use official company communications to report violations of Shamrock's blogging rules and guidelines, customers' or associates' complaints about blog content, or perceived misconduct or possible unlawful activity related to blogging, including security breaches, misappropriation or theft of proprietary business information, and trademark infringement.

Associates can report actual or perceived violations to supervisors, other managers, or to Human Resources.

(12) ***Reporting Violations***

As a condition of employment and continued employment, associates are required to sign an Electronic and Telephonic Communications Acknowledgement Form. Applicants are required to sign this form on acceptance of an employment offer by Shamrock.

(13) **Guidelines to Appropriate Conduct**

Listed below are some of the rules and regulations of Shamrock. This list should not be viewed as all-inclusive. It is intended only to illustrate the types of behavior and conduct that Shamrock considers inappropriate and grounds for disciplinary action up to and including termination of employment without prior warning, at the sole discretion of the company, including, but not limited to, the following:

(A) Theft and/or deliberate damage or destruction of property not belonging to the associate, including the misuse or unauthorized use of any products, property, tools, equipment of any person or the unauthorized use of any company-owned equipment.

(B) Any act that interferes with another associate's right to be free from harassment or prevents an associate's enjoyment of work . . . or conduct that creates a disturbance in the workplace.

(14) No Solicitation, No Distribution

The conducting of non-company business related activities is prohibited during the working time by either the associate doing the soliciting or the associate being solicited or at any time in customer or public areas. Associates may not solicit other associates under any circumstances for any non-company related activities.

The distribution of non-company literature, such as leaflets, letters or other written materials by an associate is not permitted . . . any time in working areas or in customer and public areas.

(15) No Solicitation, No Distribution

If you would like to post any Shamrock business-related materials, please see your Department Manager, the General/Branch Manager or the Human Resources Representative. Only these individuals are authorized to approve and post information on Shamrock bulletin boards.

WE WILL NOT threaten you with discipline for violating any of the rules set forth above.

WE WILL NOT promulgate or maintain the following rules in our Separation Agreement and Release and Waiver which tend to interfere with, restrain, and coerce you in your exercise of your rights under the National Labor Relations Act:

(1) Paragraph 9

Because the information in this Separation Agreement is confidential, it is agreed that you will not disclose the terms of this Separation Agreement to anyone, except that you may disclose the terms of this Separation Agreement to your family, your attorney, your accountant, a state unemployment office, and to the extent required by a valid court order or by law.

(2) Paragraph 10

All information, whether written or otherwise, regarding the Released Parties' businesses, including but not limited to financial, personnel or corporate

information . . . are presumed to be confidential information of the Released Parties for purposes of this Agreement.

(3) Paragraph 12

You may not use/disclose any of the Company's Confidential Information for any reason following your termination and during the transition period.

(4) Paragraph 13

You agree not to make any disparaging remarks or take any action now, or at any time in the future, which could be detrimental to the Released Parties.

WE WILL NOT maintain or enforce the following Head/Ear & Cell Phone Use policy which tends to interfere with, restrain, and coerce you in your exercise of your rights under the National Labor Relations Act:

In an effort to improve the workplace safety environment, ensure the safety of our associates and to maintain compliance with State, Federal and regulatory agencies, the use of all musical devices to include but limited to cell phone and head/ear phones use within the warehouse is being discontinued effective January 4th, 2015.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL immediately rescind the rules set forth above from the Employee Handbook and **WE WILL** furnish all employees with notice that (1) advises that these rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute to all employees a revised handbook that (l) does not contain the unlawful rules, or (2) provides the language of lawful rules.

WE WILL immediately rescind the rules set forth above from the Separation Agreement and Release and Waiver and **WE WILL** furnish all employees that are currently subject to such terms, including **Thomas Wallace**, with notice that the rules have been rescinded.

WE WILL immediately rescind the rules set forth above from the Head/Ear & Cell Phone Use policy and **WE WILL** furnish all employees with notice that (1) advises that these rules have been rescinded, or (2) provide the language of lawful rules; or publish and distribute to all employees a revised handbook that (l) does not contain the unlawful rules, or (2) provides the language of lawful rules.

WE WILL offer **Thomas Wallace** immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges he previously enjoyed.

WE WILL pay **Thomas Wallace** for the wages and other benefits he lost because we fired him.

WE WILL remove from our files all references to the discharge of **Thomas Wallace,** as well as the discipline we issued to **Mario Lerma** and **WE WILL** notify them in writing that this has been done and that our conduct will not be used against them in any way.

SHAMROCK FOODS COMPANY
(Employer)

Dated: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

2600 N CENTRAL AVE, STE 1400
PHOENIX, AZ 85004-3019

Telephone: 602-640-2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that a copy of **GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE** in Case 28-CA-150157 was served by E-Gov, E-Filing, and E-mail on this 25th day of November 2015, on the following:

Via E-Gov, E-Filing:

The Honorable Jeffrey D. Wedekind
Administrative Law Judge
National Labor Relations Board
Division of Judges, San Francisco Division
901 Market Street, Suite 300
San Francisco, California 94103-1733

Via E-mail:

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Respectfully submitted,

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